INTERIM STUDY
BY THE
SUBCOMMITTEE ON JUDICIARY



# Limitations on the Waiver of Sovereign Immunity

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# LIMITATIONS ON THE WAIVER OF SOVEREIGN IMMUNITY

A REPORT TO THE
FORTY-FIFTH LEGISLATURE

Subcommittee on Judiciary

December 1976

Membership

Subcommittee on Judiciary

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# INTRODUCTION AND SUMMARY OF SUBCOMMITTEE DELIBERATIONS

The Legislative Committee on Priorities assigned a study of the question of sovereign immunity and liability insurance for the state to the Subcommittee on Judiciary at the close of the 1975 legislative session. Reacting to the abrogation of all immunity to suit for injury to persons or property by the 1972 Constitution, the legislature had proposed a constitutional amendment, which was passed by the people in the 1974 general election. The amendment allows the legislature to immunize governmental entities from suit by specifically enacting the immunity by a two-thirds majority in each house. The problem faced by the Subcommittee on Judiciary was to determine what limitations on suits against government might be appropriately enacted and what measures should be taken to establish better insurance and claims procedures to manage the liabilities that would remain.

During the summer and fall of 1975, the subcommittee considered the problems of governmental tort liability and the history of immunity generally. The subcommittee also studied insurance of liability risks and the concepts of deductible coverages and self-insurance programs. Following these studies, in November 1975, the subcommittee began writing draft proposals to limit exposure to the effects of tort suits in three ways: by providing some immunity from suit, by providing certain defenses against liability, by placing limits on liability, and by disallowing recovery of various categories of damages.

In further deliberations during the spring and summer of 1976, the subcommittee decided to provide a means for review of legal fees in an effort to reduce the chance that an excessive number of claims would be made against governments because of high attorney fees. The subcommittee also decided to authorize the establishment of deductible and self-insurance reserves to provide for efficient management of the government's liability risk.

As a final step in the study, the subcommittee considered a number of existing statutes that seemed to relate to the question of sovereign immunity as it existed prior to constitutional changes. As a result of considering these statutes, the subcommittee proposed reenacting some under the two-thirds rule to assure the immunity those statutes conferred in the past remains valid in the future, removing immunity related language from others, and repealing several sections altogether.

The bills included in the appendices of this report embody the results of the subcommittee's interim study. The balance of the report is designed to relay to the legislature some of the more significant facts reviewed by the subcommittee in deriving its recommendations.

Many people assisted the subcommittee and staff throughout the conduct of the study. Dean Zinnecker and members of his staff at the Montana Association of Counties and Dan Mizner of the League of Cities and Towns helped to inform the subcommittee about local government problems and needs. Mike Young, Administrator of the Insurance and Legal Division of the Department of Administration helped the subcommittee understand some of the practical problems faced by government in the management of tort liability risks. Tom Maddox provided continued assistance from the point of view of the Independent Insurance Agents of Montana and the Montana Insurance Education Foundation. Ray Conger and Arnold Kuenning also helped provide informed comment about the insurance of state liability risks. Woody Wright, now an attorney with the Department of Fish and Game, provided support to the subcommittee in the first portion of the study and developed the information related to the history of sovereign immunity and insurance problems contained in this report.

The subcommittee determined that Senator Thomas E. Towe would introduce recommended legislation on behalf of the subcommittee.

## THE HISTORY OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN MONTANA

An understanding of the milieu in which the constitutional abrogation of nonimmunity from suit developed is necessary both to fully appreciate the meaning of the existing nonimmunity and to make clear judgements concerning whether and how some immunity should be restored. This section discusses the development of "sovereign" or "governmental" immunity law in Montana prior to adoption of the constitution and then discusses important events that have occurred since that time.

### *HISTORY AND PRACTICE PRIOR TO 1972*

Sovereign immunity as legal doctrine was accepted by the Supreme Court of Montana early in Montana's statehood as a defense to claims of contract liability against the state.[1]* This defense was applied to "discretionary" acts of state executive officers. Since that time, the application of the doctrine has been refined and more recently has been limited in application. The constitution adopted in 1972 abrogated the doctrine in its entirety. Article II, Section 18, of the new constitution provided that government entities had no immunity from suit for injury to a person or property. The state and its local entities are now in the position of a natural person with regard to tortious acts committed by government or its employees. While the constitution abrogates all immunity from suit by whatever name, the abrogation has most commonly been referred to as an abrogation of sovereign or governmental immunity because of the development of those doctrines prior to 1972.

The first decision accepting the state's use of sovereign immunity in tort came in 1926 with the decision of Mills v. Stewart, 247 P.332, 76 Mont. 429 (1926). In Mills, while upholding the constitutionality of a legislative appropriation for a claim submitted to the Board of Examiners, the court said "[it] is elementary that a state cannot be sued without its consent or be compelled against its will to discharge any obligation," Mills at 439.

In 1945, the doctrine was restated: "[the] state cannot be sued in its own courts without its consent or be compelled against its will to discharge any obligation."[2] This immunity "extend[ed] to the boards, commissioners, and agencies through which the state must act."[3]

Cases other than Heiser, supra note 2, have clarified the extent of the doctrine, or more clearly established which boards or

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*The footnotes for this section appear on pages 9 and 10.

agencies were included in the immunity. The state highway commission was included while it performed those duties imposed by law.[4] School districts were protected.[5] However, the doctrine did not include breach of contract.[6]

The most extensive litigation, and confusion, about sovereign immunity concerned the application of the doctrine to municipalities. Montana accepted the principle that a municipality may invoke sovereign immunity when it performed a governmental function, rather than a proprietary one. Other states, like Illinois, do not extend sovereign immunity to local entities. Instead special tort claims acts are enacted to deal with liability of local governments.

In Montana, a proprietary function has been described as a function "granted for the special benefit of and advantage of the urban community embraced within the corporate boundaries."[7] A wrong (tort) committed in performance of ministerial (non-discretionary) acts brought liability to municipal corporations as to other private corporations.[8] Thus, where a child died in a swimming pool operated by a municipality under provisions of its charter, that municipality could not claim sovereign immunity because the swimming pool was to the special benefit and advantage of that one municipality.

Governmental functions have been described as "those (functions) conferred upon such a corporation (municipality) as a local agency of prescribed and limited jurisdiction to be employed in administering the affairs of the state and promoting the public welfare generally...".[9]

The rationale for the distinction between governmental and proprietary varies. One reason given for the distinction is, when a municipal corporation performs "governmental" functions it is an involuntary agent of the state and therefore included within the state's immunity.[10] In this capacity municipalities have been similar to counties as only political subdivisions of the state.[11] Another justification is based on the concept of police power. Because the source of a municipal corporation's police power is the state, the exercise of that power is a governmental function.[12] Finally, a third theory is, whenever a municipality performs a state-imposed duty it exercises a governmental function.[13]

In its "proprietary" capacity a muncipality's powers are not exercised for the benefit of the state at large, but only for the private advantage of the community. As to these powers, the municipality is treated in much the same fashion as a private corporation.[14]

Generally then, the difference between "governmental" and "proprietary" functions seems to be one of statewide interest versus local or private interest. Because the state has an interest in law and order, the maintenance of a municipal police force is a

governmental function.[15] The state may be liable for actions of local employees when they enforce state laws. Only the local community is interested in a constant supply of water and so operation of a water utility is a proprietary function.[16] While only the community is directly benefited by an efficient sewage system, the state's interest in public health makes it a governmental function.[17]

The confusion becomes even more acute when the municipality performs both a governmental and a proprietary function. In Safransky v. Helena,[18] the plaintiff contracted typhoid fever from the municipal water system after a sewer line broke and sewage leaked into a water main. The municipality tried to avoid liability on the ground that operation of the sewage system was a governmental function. The court held that both protection of the water supply from pollution and correction of the defective sewer system became part of the municipality's corporate duty in carrying out its proprietary function of supplying water to its citizens.[19]

In Campbell v. Helena,[20] the municipality contended it was not liable for sickness resulting from impure water because the state board of health had assumed responsibility for checking pollution through the municipal health officer. The court found that although public health was a state concern and thus governmental, the municipality was acting in its proprietary capacity when furnishing water. Therefore, the municipality has a proprietary duty to see that the water supply is free from filth and germs which will affect the health of its customers. To hold that responsibility for polluted water is solely a governmental function would also permit private water companies to avoid liability. The municipality was not acting under a direct mandate from the state health officer and therefore was liable for both the quantity and quality of the water it supplied.[21]

Review of the various functions performed by municipalities shows the following functions have been found to be outside the doctrine of sovereign immunity, i.e., there was tort liability even before 1972 constitutional changes: operation of recreational facilities, particularly swimming pools and parks;[22] operation of utilities, particularly water systems;[23] operation of sewers, drains and ditches when the municipality's negligence causes contamination,[24] improper maintenance,[25] flooding,[26] or faulty design of roadways;[27] mob violence, riot;[28] change of grade of street;[29] defects and obstruction on streets and sidewalks, with proper notice to the municipality when seeking damages,[30] but no notice requirement when seeking an injunction;[31] failure to maintain streets even if maintenance is contracted to another party;[32] failure to warn of obstructions or dangerous defects on public streets;[33] sidewalks are treated similarly to streets;[34] trap-doors in sidewalks;[35] adjacent hazards;[36] nuisances;[37] and fire department operation, except when extinguishing fires, going to and from fires, testing equipment for use at fires, etc.[38]

Counties, generally, were considered to perform governmental functions and therefore availed themselves of sovereign immunity. However, a joint project of a city and county "of mutual benefit to both city and county lying outside (the) duty imposed by the state [was] proprietary."[39] Thus where a county operated a ditch jointly with a city to the mutual benefit of both, and injury resulted from improper repair of a highway intersecting the ditch, the county could not claim sovereign immunity.[40] Further, the operation of a ferry was a proprietary function.[41]

School districts could also avail themselves of sovereign immunity even when injury took place during optional activities.[42] Generally these districts were considered to be acting in capacity of a governmental function regardless of the function performed.[43]

At the state level, not all activities or actions of the state were included in sovereign immunity. Where the constitution provided just compensation upon the taking of private property, sovereign immunity was waived -- City of Three Forks v. Montana Highway Commission, 156 Mont. 392, (1971). The doctrine was also waived in some cases by adherence to substantial portions of the Fair Labor Standards Act -- Glick v. State By and Through Montana Department of Institutions, 485 P.2d 42 157 Mont. 204 (1971). Generally the state and its agencies were protected when a highway was in defective condition;[44] providing a bulldozer and driver to fight forest fires on state land;[45] illegally confiscating a gun;[46] and passing on a claim for personal injury.[47]

That the legislature could institute some form of waiver of sovereign immunity was never in doubt. In finding immunity to apply where a private citizen sought an injunction to keep state officers from passing on a claim for personal injury, the court stated, "the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability", Mills supra on page 1. The legislature did not directly avail itself of the opportunity to establish any waiver of sovereign immunity until 1971, when it waived sovereign immunity for those state employees acting within the scope of their employment, but only to the extent of liability insurance purchased, 83-701, 83-706, R.C.M. 1947.

In 1968, the Supreme Court held that a statute establishing requirements as to buses, drivers, and operation of school buses and providing that school districts owning and operating their own buses must carry automobile bodily injury liability insurance, waived governmental immunity of the school district to the extent of insurance required to be carried or actually carried.[48] This action by the court led to the general waiver of immunity up to the limits of insurance purchased.

Insurers of governmental entities were required to waive the right of sovereign immunity as a defense (40-4401, R.C.M. 1947). Further, insurers could not raise the defense of sovereign immunity when

the insurer provided casualty or liability insurance for a public entity (40-4402, R.C.M. 1947).

Prior to enactment of legislation allowing insurance, the practice of the legislature was to accept or reject claims as it saw fit. An example of this procedure is the claim of Robert E. Wright, House Bill No. 309, Laws of 1953, an appropriation bill. The legislature authorized the State Board of Examiners to hear, audit and determine the claim of Robert E. Wright. The board was then to approve and allow so much of the claim as was just and equitable. The claim could not exceed $7,500 and that amount or so much as was necessary was appropriated to pay the claim.

Before adoption of the 1972 constitution the doctrine of sovereign immunity was the law of Montana. There were waivers and specific exceptions but these diversions only indicated the traditional doctrine was still in effect.

*THE 1972 CONSTITUTION AND ABROGATION OF IMMUNITY FROM SUIT*

The general consensus at the Constitutional Convention of 1972 was to do away with the doctrine of sovereign immunity. As submitted to the committee of the whole, the convention transcripts show that the amendment proposing abolition of sovereign immunity read:

> "Section eighteen, Non-Immunity from suit: The state and its subdivisions shall have no special immunity from suit. This provision shall apply only to causes of action arising after June 1, 1973."

During the discussion that followed, delegate Otto Habedank proposed an amendment to include words limiting the abolition to injury of person or property, because he objected to the possibility that elimination of sovereign immunity would go beyond injury to person or property. He readily accepted that the state and its political subdivisions were to be liable for negligent injury and apparently thought the inclusion of those words had some limiting effect, probably in the contractual area.

The scope of the abolition was not in doubt. Not only did it include the state and its agencies, but school districts, school boards, fire departments, law enforcement agencies, cities, towns, irrigation districts and "anything which might come within the doctrine of sovereign immunity."

Thus, the plain language of the section adopted abolishes immunity altogether.

FOOTNOTES

[1]State ex rel R.M.F. Co. V. Toole, 26 Mont. 22 (1901).

[2]Heiser V. Severy, 158 P.2d 501, 117 Mont. 105, 111 (1945).

[3]Id.

[4]Coldwater v. State Highway Commission, 162 P.2d 772, 118 Mont. 65 at 74 (1945).

[5]Longpre v. Joint School District No. 2 of Missoula and Mineral Counties, 443 P. 2d 1, 151 Mont. 345 (1968).

[6]Meens v. Board of Education, 267 P. 2d 981, 127 Mont. 515 (1954).

[7]Griffith v. City of Butte, 234 P. 829 72 Mont. 552 (1925).

[8]Felton v. City of Great Falls, 169 P. 2d 229, 118 Mont. 586 (1946).

[9]Griffith, supra note 7.

[10]Witter v. Phillips County, 109 P. 2d 56, 58, 111 Mont. 352 (1941).

[11]Id.

[12]Gibhardt v. City Council, 55 P. 2d 671, 676, 102 Mont. 27 (1936).

[13]Kingfisher v. City of Forsyth, 314 P. 2d 876, 879, 132 Mont. 39.

[14]Felton, supra note 8 at 588.

[15]Kingfisher, supra note 6.

[16]Helena Consolidated Water Co. v. Steel, 49 P. 382 20 Mont. 1 (1897).

[17]Campbell v. City of Helena, 16 P. 2d 1, 92 Mont. 336 (1932).

[18]39 P. 2d 644, 98 Mont. 456 (1935).

[19]Id. at 649.

[20]Campbell, supra note 10.

[21]Id. at 3.

[22]Campbell, supra note 10 at 2, Safransky, supra note 11.

[23]Campbell, supra note 10 at 3.

[24]Safransky, supra note 11 at 649.

[25]Stevens v. City of Butte, 85 P. 2d 339, 107 Mont. 354 (1938).

[26]Nesbitt v. City of Butte, 163 P. 2d 251, 118 Mont. 84 (1945).

[27]Watson v. City of Bozeman, 156 P. 2d 178, 117 Mont. 5 (1945).

[28]Butte Miners' Union v. City of Butte, 194 P. 149, 58 Mont. 391 (1920).

[29]State ex rel City of Miles City v. Northern Pacific Railway Co., 295 P. 257, 88 Mont. 529 (1930).

[30]Section 11-1305, R.C.M. 1947.

[31]Green v. City of Roundup, 157 P. 2d 1010, 117 Mont. 249 (1945).

[32]Barry v. City of Butte, 142 P. 2d 571, 115 Mont. 224 (1943).

[33]Snyder v. Town of Chinook, 138 P. 1090, 48 Mont. 484, 488 (1914); Tiddy v. City of Butte, 65 P. 2d 605, 104 Mont. 202 (1937); Maynard v. City of Helena, 160 P. 2d 484 117 Mont. 402 (1945).

[34]Sullivan v. City of Helena, 25 P. 94, 10 Mont. 134 (1890); Snook v. City of Anaconda, 66 P. 756, 26 Mont. 128, 134 (1901); May v. City of Anaconda, 66 P. 756, 26 Mont. 128, 134 (1901).

[35]Sweeny v. City of Butte, 39 P. 286, 15 Mont. 274 (1895).

[36]Tiddy v. City of Butte, supra note 33 at 210.

[37]Murray v. City of Butte, 88 P. 789, 35 Mont. 161 (1907).

[38]Kern v. Arnold, 49 P. 2d 976, 100 Mont. 346 (1935).

[39]Johnson v. City of Billings and Yellowstone County, 54 P. 2d 579, 101 Mont. 462 (1945).

[40]Id.

[41]Jacoby v. Chouteau County, 112 P. 2d 1068, 112 Mont. 70 (1961).

[42]Bartell v. School District #28, Lake County, 137 P. 2d 422, 114 Mont. 451 (1943).

[43]Perkins v. Trask, 23 P. 2d 982, 95 Mont. 1 (1933).

[44]Kaldahl v. State Highway Commission, 490 P. 2d 220, 158 Mont. 219 (1971).

[45]Kish v. Montana State Prison, 505 P. 2d 891, 161 Mont. 297 (1973).

[46]Heiser, supra note 2.

[47]Mills, supra page 1.

[48]Longpre, supra note 5.

*THE 1974 AMENDMENT TO ARTICLE II, SECTION 18*

The section of the constitution dealing with immunity became effective July 1, 1973. Within one year the legislature adopted S.J.R. 64, Laws of 1974, presenting to the people a constitutional amendment that allowed the legislature to limit the scope of the section's total abolition of immunity. The amendment was adopted by the state's citizens and became effective July 1, 1975.

The amended section now reads:

> "Section 18. STATE SUBJECT TO SUIT. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature." (Underlining shows the amendment.)

The 1975 session of the legislature considered Senate Bill 206 but could not reach agreement over the extent or type of immunity to be granted. Instead, the Senate Judiciary Committee requested the legislature's priorities committee to assign a study on the subject. This report is the result of that request.

*DEVELOPMENT OF CASE LAW SINCE 1972*

Only one suit involving section 18 reached the Supreme Court before the effective date of the amendment: Noll v. City of Bozeman, 32 St. Rep. 415, 534 P. 2d 880. The court, in reversing a district court ruling, held unconstitutional a 120-day filing requirement on tort claims against the state. The court cites the Transcript of Proceedings that indicated the framers (of the Montana Constitution) "wished to preclude limitations upon the waiver of sovereign immunity". The time limitation was found to be a restriction upon the abolition of immunity that would destroy the constitutional grant itself and was therefore clearly unconstitutional.

The court did not rule on the amendment to section 18 because it came into effect after the cause arose. Thus the meaning of "specifically provided" has not been defined. The court did affirm the right of the legislature to impose a reasonable statute of limitations on the right. It is obvious further specific limitations may be imposed on a private person's right to sue the state only when the legislature has definitely considered that limitation. It is also possible that limitations that cut off a private person's right to sue the state in a manner more restrictive than the right to sue other persons would be held unconstitutional even though the limitation passed the legislature by the constitutionally required vote.

Further litigation surrounding the extent of the abrogation of immunity was under consideration by the Supreme Court (nos. 13605 and 13606 Supreme Court of Montana, 1976) at the time this report was prepared. The pertinent arguments in these cases concerned whether judicial and prosecutorial immunity had been abrogated by the 1972 constitution. One side developed an argument that judicial and prosecutorial immunity was the law in Montana and that the immunity goes to the officers themselves. The other side argued that the constitution abolished all immunity to suit and that the legislature had clearly understood this when it enacted the Montana Comprehensive Insurance and Tort Claims Act, Title 82, Chapter 43, R.C.M. 1947. No decision had been made by the Court when this was written.

## EXISTING MONTANA STATUTES RELATING TO GOVERNMENTAL TORT LIABILITY

### *EXISTING STATUTES GENERALLY*

Many statutes have been enacted over the years that reflect in some manner or other the existence of the concept of governmental immunity from suit. In addition, statutes that provide procedures for claims against governmental entities take on new meanings when considered against a background of governmental nonimmunity. This section includes discussion of the effects of constitutional changes on existing sections and the consideration given to the status of existing statutes by the subcommittee.

### *EFFECTS OF CONSTITUTIONAL CHANGES ON EXISTING STATUTES*

Prior to the abolition of all governmental immunity to suit by the 1972 constitution, numerous statutes were enacted that recognized the existence of the doctrine. These statutes were designed to restate the doctrine in part, to abrogate the doctrine in part, to place liabilities on certain officers or entities, or to speak to the issue in some other way. In view of the total abrogation of immunity to suit in 1972 and the modification of that abrogation in 1974, questions on the validity of many of these statutes have arisen. Two staff attorneys of the Legislative Council Legal Services Division studied this question and arrived at slightly different views.

In a November 1974 memo, Woody Wright argued that neither the 1972 adoption of Article II, Section 18, nor the 1974 amendment of that section effected a repeal of statutes relating to sovereign immunity and thus those statutes remain in force. The crux of his argument is that a statute must be clearly repugnant to the new constitution before it is superceded.

Tom Malee, in a November 1975 memo, stressed a different aspect of the problem. He argued that the Montana Supreme Court has held that statutes inconsistent with, or repugnant to, a subsequently adopted constitution are repealed by the adoption of that constitution, and are inoperative or void from that date. Since constitutional provisions operate prospectively unless they state otherwise, the 1974 amendment cannot reach back to resurrect statutes that were unconstitutional between July 1, 1973 and July 1, 1975 even if they can meet the muster of a two-thirds vote.

Mr. Wright thus emphasizes that statutes clearly repugnant to the constitution are superceded but stand until competent authority -- the court -- declares them unconstitutional. Mr. Malee points out that unconstitutional statutes are void from the time they became unconstitutional. The dilemma is that void statutes will often remain unrecognized in the law and cannot be ignored until adjudged unconstitutional by the court.

With this in mind, the subcommittee decided to consider all statutes containing language that tends to limit the concept of suability against governmental entities as having been void since July 1, 1973. These statutes could then be recommended for repeal or those features of the statutes that are consistent with the subcommittee's policy goals could be reenacted free of this constitutional cloud. In addition the problem of public officials acting under possibly invalid statutes would be reduced. To this end, the subcommittee directed that existing statutes related to immunity be brought to the attention of the subcommittee.

*ANALYSIS OF EXISTING STATUTES*

In order to identify the sections most likely to require consideration, the Legislative Council's Statutory Information Retrieval System (SIRS) was used. The computer was asked to search the Revised Codes of Montana for the following types of sections:

1. Sections containing references to claims;
2. Sections containing references to sovereign immunity, governmental immunity; or immunity from suit;
3. Sections containing references to liability insurance for schools, special districts, county or soil conservation districts; and
4. Sections containing forms of the word "liability" in combination with forms of the words "civil action", "injury", or "tort".

The searches led to the identification of 1,879 references in 435 sections of the codes. However, only a few of these sections related directly to the questions under consideration by the subcommittee. Those sections directly related to the subcommittee's task were discussed in the course of two subcommittee meetings.

Each section considered was measured against the following questions:

1. Does the section attempt to confer an immunity? If a conferred immunity goes to officers and employees only, does the statute seem to assume sovereign immunity would also protect the government entity? Is the sense of the section to confer immunity to the government for the activity?

2. Does the section conflict with or has it been made obsolete by subcommittee recommendations?

3. Should the provisions of the section be maintained, extended, or repealed? If they are to be maintained or extended must there be a two-thirds vote for the section to be valid?

A list of sections analyzed by the subcommittee and a brief description of its decisions is included below.

*LIST OF SECTIONS CONSIDERED BY THE SUBCOMMITTEE BEARING A RELATIONSHIP TO THE LIABILITY OF PUBLIC ENTITIES AND THEIR OFFICERS OR EMPLOYEES IN TORT*

Section 1-502. This section provides immunity from suit for torts committed by the state, municipalities, or their agents as a result of most activities surrounding airports.

Section 1-822. This section states that activities surrounding the operation of airports under the Municipal Airport Act are public and governmental functions. Under the former construction of immunity law, the court declared that a municipality was immune from suit for injuries resulting from operation or maintenance of an airport.

The subcommittee determined that section 1-822 is obsolete and should be repealed. Section 1-502 is amended to remove the immunity language.

Sections 11-1301 to 11-1309. These sections concern presentation of claims against cities and towns including noted requirements. Notice includes constructive notice of an existing hazard as well as limitation on notice of harm. The provisions of 11-1302 and 11-1303 were held not to apply to a claim for damages arising from personal injuries. (Dawes v. City of Great Falls, 31M 9, 13; 11P 309) (q.v. to see the impact of). 11-1305 requires the constructive notice of defect of highways and public works prior to injury and notice of injury within 60 days after the alleged injury. The court once held that the section did not constitute unjust discrimination in favor of municipalities. (Town v. City of Helena, 42M127, 133; 111P 715). 11-1306 exempts cities and towns from liability for injuries caused as a result of accumulation of snow or ice in streets or public ways. The section was upheld against an attack based on an argument that the courts should provide a remedy to all person injured. The court based its decision on the notion that that provision referred only to actionable injuries. (Stewart v. Standard Publishing Co., 102M 43, 48; 55P 2d 694). 11-1307 provides interest at a maximum rate of 6% upon unpayable warrants. The exact rate is set by ordinance.

The subcommittee determined that these sections relating to normal operating claims should be retained, but those portions relating to sovereign immunity should be removed. Sections 11-1305 and 11-1306 are included in a bill to be repealed. The subcommittee recognized that the local government bill of the State Commission on Local Government would probably achieve the same purpose if enacted.

Section 11-1409(4). This section provides that emergency expenditures beyond the budget may be made "in settlement of approved claims for

personal injuries or property damages, exclusive of claims arising from the operation of any public utility owned by the municipality..." Because action of the governing body is discretionary this section does not conflict with subcommittee proposals related to the same subject.

Section 11-1941. This section immunizes persons authorized to transmit fire reports to a volunteer fire department from liability in civil action for damage to property or persons if they fail to report a fire -- unless the failure constituted gross negligence. Since this section provides immunity to an individual rather than governmental entity it was not considered a proper concern of the subcommittee.

Sections 16-1801 to 16-1811. These sections cover presentation of claims against counties and drawing of warrants on the county. Section 16-1802 states that every claim must be presented within a year after the last item accrued. The court has said this provision establishes a condition precedent to the commencement of an action against the county for recovery of a claim. (Powder River Cattle Co. v. Commissioners of Custer County, 9M145, 152; 22P 383. Greeley v. Cascade County, 22M580, 588; 57P 274.) This, however, does not cover all actions for recovery that might seem to be claims. (Flynn v. Beaverhead County, 54M309, 170P 13, explained in 133M 323, 326; 323P 2d 270.)

The subcommittee recommends amendment to this body of law to clarify that it does not apply in the case of tort claims. An amendment to 16-1802 accomplishes this goal.

Sections 16-2731, 2732. Counties must purchase liability insurance for the sheriff, undersheriff, deputy sheriffs, and members of any voluntary rescue organization providing a minimum of $100,000 per occurrence. The insurance covers the officer for bodily injury, sickness or disease, false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, liable, slander, defamation of character, violation of property rights and other personal civil rights, and other necessary coverage while the officer is on official business within the scope of his employment. The statute says the insurance shall pay all claims for which the insured officers become legally liable. In view of the subcommittee recommendation that liability for governmental entities would be limited and local governments authorized to cover their risks as they best see fit, the subcommittee determined that the counties should have discretion in this area as well. There should be no problem for the sheriff personnel because the section requires the county to join as a defendant in a tort action against them anyway. These sections are recommended for repeal.

Section 16-2914. This section makes the county clerk and recorder personally liable for damages when he refuses or neglects to do his duties. The section also extends to incomplete and defective performance of duties in some cases. The section establishes liability at three times the damages occassioned. Because the section merely creates a liability rather than extending an immunity, no action was required.

Section 17-205. This section provides that a jury may award interest in a verdict in every case of oppression, fraud, or malice. In Wright v. City of Butte, 64M362, 372; 210 P 78, this section was held to allow a jury to award interest in damages caused to plaintiff's property by the city while it was grading a street. This section conflicts with a subcommittee recommendation that no interest be allowed in tort claims actions against governmental units. An amendment to the section is thus proposed.

Section 28-603. This section exempts rural fire chiefs from damages resulting from their entry upon private property to suppress forest and farm resource fires. The subcommittee recommends that the provisions of this section be expanded to include the district, county, and deputy chiefs.

Section 31-172. This section provides immunity to any public entity for loss or injury resulting from false information on an identity card issued under an act authorizing the highway patrol to issue identification cards to persons over eighteen who do not have a driver's license. While the subcommittee thought this was not an extremely significant section, it saw no real need to continue it. Because it is an immunity section it was recommended for repeal.

Section 32-4722. This section authorizes employees of the Department of Highways to enter private land to remove illegal signs. One sentence states that the department incurs no liability for that entry unless there is injury resulting from negligence, wantonness, or malice. The subcommittee questioned whether there could be liability for proper performance of a legal duty. Thus the sentence limiting liability is recommended for removal from the statute.

Sections 40-4401 and 40-4402. Section 40-4401 requires writers of casualty insurance contracts covering state-owned properties or state risks to waive the right to raise the defense of sovereign immunity. The section demands that policy contracts contain a clause waiving this right. Section 40-4402 expands upon section 40-4401, which was passed six years earlier. Thus, the legislature provided for waiver of sovereign immunity under insurance contracts for state-owned property and state risks from 1959 to 1963. In 1963 this was expanded to cover all government entities (apparently) in connection with casualty and liability policies. The section also directed the courts to reduce judgments to the policy limits if it finds defense of sovereign immunity could have been raised. This statute has probably survived the 1972 constitutional change because of its conditional language. It might also apply when the legislature acts under the 1974 amendment. The subcommittee recommends that these sections be amended to coordinate with recommendations creating certain immunities. As amended, the section requires contracts to waive the right to raise immunity as a defense in coordination with other recommendations.

Section 46-243. This section grants immunity to members of the Department of Livestock for official acts and decisions under the act providing for inspection and destruction of livestock for sanitary reasons. Because no liability would attach in any event if a department member performed his duty properly, the subcommittee recommends this section be repealed.

Section 69-6405. This section immunizes members of the "Board of Eugenics"; any physician, surgeon, or assistant; or any other person participating in executing the provisions of the law relating to voluntary sterilization. If a sterilization is voluntary, there can be no liability. If there is negligence involved there should be liability. The subcommittee therefor recommends that this section be repealed.

Section 75-5939. This section authorizes the purchase of liability insurance by school districts and provides that the premiums for such insurance be paid out of the general fund. It contains a reference to 40-4402, which, in light of subcommittee recommendations for that section, is no problem. No change in this section is recommended.

Section 75-5940. This section provides that judgments against a school district be paid in the same manner as any other obligations of the district. This provision conflicts with recommendations for paying judgments included in general subcommittee decisions. The section is recommened for repeal.

Section 75-8310. This section authorizes establishment of school safety patrols and provides immunity from liability to school districts and school personnel associated with their establishment and operation for injuries sustained by any pupil in connection with the patrols. The subcommittee felt that there should be school district liability if negligence did exist in showing pupils how to be school patrol members. The subcommittee recommends amending this section to immunize only parents and students, except for gross negligence on their part.

Section 77-2308. This section provides that the state and its political subdivisions are not liable for personal injury or property damage suffered by a person or agency engaged in civil defense activities. Agents of the government are likewise exempt.

The section also provides general immunity from liability for the state and its agents while trying in good faith to comply with the civil defense laws. Exceptions to the immunity of agents are willful misconduct, gross negligence, or bad faith.

The subcommittee recommends that this section be amended and reenacted by a two-thirds vote to provide immunity only in emergency situations. Civil defense activities include drills and other preparatory activities that should not have immunity associated with them.

Sections 82-1113 through 82-1119. These sections provide procedures for presentation and consideration of claims against the state before the Board of Examiners when no other means of settlement has been provided by law. The Board considers the facts of the claim and prepares a recommendation to the legislature as to whether and to what extent the claim should be paid. A person who disagrees with a Board decision may appeal to the legislature. The subcommittee suggested that these sections provide a mechanism for appeal to the legislature for additional payments under its recommendation that the legislature be allowed to award damages in excess of statutory limits.

Sections 82-4301 through 82-4327. This is the Montana Comprehensive Insurance Plan and Tort Claims Act. As the short title implies, these sections provide for insurance against property, casualty, liability, crime and fidelity, and other state risks by the Department of Administration with mandatory participation of state agencies. Political subdivisions of the state are allowed to purchase insurance. The second part of this act establishes procedures for bringing claims. Claims may be approved by a governmental entity or suit may be brought by the claimant. When the state is sued, summons is to be served on the Secretary of State. Punitive damages, attorney fees, and interest are not liabilities of governmental entities under this act. Attachment and execution are prohibited. Two sections, 82-4311 and 82-4314, relating to time limits for filing claims have been struck down because they contain limits on the waiver of sovereign immunity not allowed by the constitution. Section 82-4317, providing a two-year statute of limitations on suits, was specifically upheld.

The subcommittee recommended numerous changes in the claims procedures and authorizations for insurance contained in this title. The unconstitutional provisions relating to time limits were stricken and replaced by a reference to general statutes of limitations that apply to all actions in the state. Under the recommended bill, claims are filed with the Department of Administration or clerk of a political subdivision. Claims settled out of court must be approved by the district court.

Sections 83-701 through 83-707. This chapter of the State Sovereignty and Jurisdiction Title provides that the district courts have exclusive jurisdiction on any claim against the state arising on account of injury to property or persons. The chapter provides for practice and procedure the same as if the state were a private person. The same provisions for counter claim and set off and for interest upon judgment are established. The Attorney General is the official responsible for handling and defending claims. The subcommittee found this chapter to be obsolete and recommends its repeal.

Section 89-115. Subsection (2) of this section attempts to transfer liability for damages resulting from a failure to maintain water works in a safe working and operating condition from the state to

the incorporated water users' association that operates and maintains the works.

This law resulted from a recommendation contained in a 1972 Legislative Council study of water resources, and that recommendation was a reaction to the adoption of Article II, Section 18 in the new constitution.

According to the report, the state acquired interests in real property located around project sites while Water Conservation Board projects were being developed. These interests include easements, rights-of-way, and actual title to lands. Apparently the state still owns some of these interests, but at the time of the study it was not clear which ones. Divesting the state of ownership was said to be difficult. Thus the Council feared that the state could become liable for damages that might be associated with this state-owned property.

The originally proposed language attempted to place liability on the operating water users' associations on the theory that the associations were responsible for all operation and maintenance.

The subcommittee agreed that the state should not be liable for work-related liabilities for which it has no responsibility and recommends reenactment by a two-thirds vote with some changes in wording.

Section 89-3514. This section provides the state, the Board of Natural Resources and its members, and the Department of Natural Resources immunity from suit for damages sustained because of injury caused by an obstruction constructed in a floodway for which a permit had been granted under the floodway management and regulation statutes. If a person places an obstruction in a floodway without a permit -- when there is a wrongful failure to comply with the act -- there is a rebuttable presumption that the obstruction was the probable cause of the flooding of the land bringing suit. The immunity provisions in essence say the state has no duty to guarantee that injury will not occur by issuing a permit for placing the obstruction. The subcommittee recommends this section be reenacted by a two-thirds vote. Minor amendments to the style of the section recommended by the Code Commissioner are included.

Title 92. Workers' compensation provisions establish an exclusive remedy for covered workers. If this provision can be construed as having provided an immunity from suit for governmental entities it could be that the section would have to be reenacted. The subcommittee, however, considered the fact that Article II, Section 16 provides with equally strong authority that an employee may be denied his full legal redress against his employer and fellow employees if the immediate employer provides workmen's compensation. Thus no action is recommended.

Section 93-2815. This section provides that the state may be made a party defendant in actions affecting the title to real or personal property in which the state may have an interest or claim. A proviso is included that no money judgment may be rendered against the state in connection with operation of the section.

It appears that the proviso was designed to prevent the section from being used as a means of circumventing sovereign immunity as it existed in 1921. It is no longer appropriate to the extent that the 1972 constitution abrogates sovereign immunity.

The proviso also is inappropriate because its enforcement could require a plaintiff to bring more than one action to enforce related claims. This is counter to the policy of the Montana Rules of Civil Procedure (see Rule 18).

The subcommittee recommends that the obsolete portion of this section be removed.

## INSURANCE OF GOVERNMENT LIABILITY RISKS

Prior to July 1, 1973, local entities and the state could purchase insurance, if they desired, and sovereign immunity was waived to the extent of that coverage. There was a specific statute for school districts, 75-7011; other entities came under the general statute, 82-4307.

The state purchased liability insurance from 1971 to 1973 at a cost of approximately $300,000 per year. Policies of political subdivisions varied, from no insurance to some coverage.

Since 1973 the state's position has changed. In that year the state purchased its comprehensive general liability insurance policy for $315,276 per year. The contract term was five years, with a 60 day notice of cancellation clause. In May 1975, the insurer notified the state of Montana that it would cancel, effective July 1, 1975. By the end of December 1974, payments under the policy had reached $125,724 while expenses were $9,075 for a total of $134,799. Claims pending in May 1975, totaled approximately $25 million. Assuming 90% of the claims to be ill-founded or spurious, there is still the possibility of $1-$3 million in payments to be made under the policy in effect before July 1, 1975.

The 1975-76 policy written for the state of Montana included comprehensive general liability, comprehensive auto liability, and fire and theft coverage on certain vehicles. Liability coverage includes personal injury, professional liability, errors and omissions. Limitations in the policy were: $1 million of comprehensive coverage on a per occurrence basis; and an annual aggregate of $1 million for products/completed operations, personal injury, professional liability and errors and omissions. Deductibles were: $25,000 per occurrence and $250,000 annual aggregate stop loss, which includes loss and defense costs, for personal injury and errors and omissions.

This is not the coverage the state of Montana sought; it was the best that was available. Insurance is written on a year by year basis at this time and will probably be written on this basis until experience under the present system provides enough data to make estimates.

Data for liability insurance coverage for political subdivisions is sparse. Hill County compiled pertinent data in early 1975. These data show a premium cost in 1966-67 of $2,314 with no losses paid. By 1969-70 costs had changed very little; $2,741 in premium costs and $47 in losses paid. However, in 1970-71 premiums began to increase. In that year, premium costs were $4,426 with $54 losses paid. Premium costs remained much the same in 1973-74: $5,822 with $258.49 losses paid. In 1974-75 premium rose to $9,707 with an unknown paid losses record at time the data was compiled.

Coverage for Hill County prior to 1973-74 was on a comprehensive liability policy which insurers would bid to write each year. In 1974-75 "no reputable insurance carrier" would even bid and the policy was written only after negotiation. Verbal reports and general discussions indicate other counties and cities have had similar experiences.

Many insurance companies that traditionally wrote liability insurance for governmental entities have stopped writing liability insurance for local or state governments. The apparent reasons are increased liability of governmental entities and a reluctance to take on law suits. In recent years the general public has shed its reluctance to sue a governmental entity and brought a variety of law suits to determine the extent of the new liability for governmental entities. Insurers don't want to bear the costs of these cases. This situation parallels the increasing problems recently emerging in professional and products liability.

Insurers are reluctant to define realistic dollar figures for limitation of liability per occurrence or by deductible. The main reasons for hesitation are the lack of "experience" since Montana's abrogation of governmental immunity from suit and the insurer's desire to "review all claims to determine the existence of a surprise case". The "surprise case" is one where a claim that is initially less than the deductible is paid by the insured. Later, unforseen development occurs to the injured as a proximate result of the original injury and the damages grow to substantial proportions. Insurers feel judicious review of problem areas by their staff saves the governmental entity and themselves time and money at a later date.

Self-insurance is often suggested as an alternative to commercial insurance, especially for losses below $100,000, as most claims fall below that figure. The governmental entity would be required to handle claims up to that amount and insurers would write insurance for losses above that amount. Thus, the insurers would write catastrophe insurance, while the day-to-day claims would be covered by the governmental entity.

Self-insurance is conceptually a method of retaining risks.* The criteria for a self-insurance program are essentially those of a sound insurance program: adequate distribution of risks, financial capacity, conscious assumption of risk, catastrophe protection and competent management. The governmental entity creates a reserve fund, which could start out at something like $1,200,000 in Montana, levies a fee from the various agencies and boards, establishes an administrative body, hires a skilled risk manager and hopes no large claims come in before the system is functioning smoothly. One provision that can make the establishment of self-insurance programs more feasible is the establishment of liability ceilings.

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*For a more detailed discussion of this concept see "Self-Insurance on State-Owned Property", Report #30, Montana Legislative Council, December, 1970.

The difference between self-insurance and "no-insurance" lies in the approach to losses. With "no-insurance", losses are left to chance and treated as current expenses. With self-insurance, the decision is made to retain certain risks and insure above a certain level.

Self-insurance was attempted in Montana in the 1930's but the attempt was short-lived and ended in failure. In 1935, the State Insurance Act (Chapter 179, Laws of 1935) was passed. This act created a state insurance fund in an amount varying from $700,000 to $1,000,000. The insurance fund was to cover "all public buildings of this state and of each and every subdivision thereof, and the contents of all such buildings". The damage protected against was "all direct loss by fire, lightning, tornado, windstorm, cyclone, hail, explosion, flood and water damage...". Policies were written for three years with the possibility of budgeted payment over that time period. The State Auditor administered the fund, as the ex-officio commissioner of insurance. The State Fire Marshal made inspections of all buildings and reported to the State Auditor on condition of public buildings. There was also provision of payments for firemen's disability funds. The act required all public officers responsible for property listed in the act to purchase insurance from the state, if any was purchased.

Within the year, the city of Missoula challenged the application of the act to municipalities, State ex rel Missoula v. Holmes, 100 Mt. 256 (1935). The challenge was based upon the difference in the way municipalities treated their proprietary functions. The Supreme Court found the act unconstitutional as related to municipalities because of unlawful interference with municipal functions and an attempt to take municipal property without due process of law. The act was saved in other respects because a "saving" clause had been included.

The entire act was repealed by a referendum vote of the people of Montana November 3, 1936, as proclaimed by the governor on December 2, 1936. A legislative repeal came in 1947, Chapter 50, Laws 1947, when the present code was revised. The state returned to commercial carriers for insurance coverage.

Self-insurance is sometimes used by private corporations to cover the deductible portion of a general liability policy. This self-insurance is not intended as liability insurance for claims over that amount. Montana Power carries a general liability policy with a deductible amount of $50,000 for any one occurrence. The company investigates, adjusts, and settles its own claims. In this instance, the self-insurance plan might be called "no-insurance" in that no specified amount is set aside to meet liability claims but are paid as they come in. (Letter of John C. Hauk, Vice-President and Secretary, Montana Power Company, July 17, 1975.)

Mountain Bell obtains its liability insurance as part of the Bell System. The general policy is for $70 million with a $2 million deductible. There are separate aircraft, owner's protective liability, and medical malpractice policies. The aircraft liability policy is $20 million with $1 million deductible. The owner's protective liability policy is $300,000 for an independent contractor. The medical malpractice policy has a limit of $300,000 per occurrence and covers only the Bell System clinics. Architects and design engineers are required to carry their own professional insurance.

Mountain Bell handles liability claims under its portion of the policy on a no-insurance basis. Each claim is assigned to a staff person and defended up to the deductible amount. Should there be an award or settlement, that amount is deducted from current corporation costs. Recent experience finds claims paid do not reach a significant amount. (Telephone conversation, G.M. Westa, General Counsel, Mountain Bell, August 5, 1975.)

E. I. duPont de Nemours and Company self-insures in the following manner:

> Third-party liability claims are handled under an "umbrella" liability policy covering bodily injury and property damage to third parties. There is a five million dollar deductible per occurrence and a maximum coverage of one hundred million dollars per occurrence. Nuisance type claims are handled by the locations involved, who usually seek advice from the Legal Department before finalizing a course of action. If suit is filed for an amount which falls within the deductible, then the Legal Department assumes control of the dispute. In most instances local counsel is retained with direction and guidance provided by the Legal Department. Since most of the claims in this area are product oriented, we prefer to be involved in the actions in order to preserve the image of the Du Pont Company, protect the integrity of our people and products, and to insure that all available technical expertise is used to the best advantage.
>
> The Du Pont Company has a fleet of some 4,000 vehicles dispersed over the United States. Each year they are involved in approximately 250 incidents a year from which liability claims arise. Because of the large number of vehicles and their wide geographic dispersion, it is not cost effective for the Company to handle the claims. A liability policy with a one million dollar limit for each occurrence and two hundred thousand dollar retrospective rating plan (deductible) provides coverage for claims arising out of the use of Company-owned and leased vehicles. Any claim settlement by the insurance carrier in excess of five thousand dollars must be approved by Du Pont. Physical damage to Company-owned vehicles is self-insured.

Claims arising from the operation of Company-owned leased or chartered aircraft are covered by a first dollar policy and under the "umbrella" policy. The cost for this coverage is such that it does not warrant the Company assuming the risk. Hull damage is self-insured. To date we have experienced no claims arising from the ownership or operation of our aircraft.

In conclusion, we have experienced no substantial problems in the area of self-insurance and in fact we have had a most favorable experience with it. Analysis of our liability claims has shown that our self-insurance program has been cost effective because of:

1. An excellent, better than average, loss experience.

2. Our financial ability to self-insure.

3. Casualty losses are tax deductible.

4. The fact that insurers set their rate structure on an allocation of 40 percent of the premium cost for expenses, reserves and profit, with the remaining 60 percent to cover actual losses.

(Letter, August 5, 1975, W.C. Hitt, Chief Counsel, Governmental Affairs Division, E. I. duPont de Nemours & Company.)

An insurance practice commonly used at present is retrospective rating, a method of balancing losses during an experience period against the amount paid for an insurance policy for that experience period. At the end of the period the insured either receives a refund or pays an extra amount, based upon the claims experience during that selected period. Key limitations in the concept are minimum nonrefundable payments to the insurer and maximum liability for the insured, above which the insurer is liable, are key elements of this concept. Most insurers favor restrospective rating in insuring governmental entities.

Applying this system to Montana for the year July 1, 1975, through July 1, 1976, the following could occur:

The policy, would be written for $1 million with a minimum guaranteed payment to the insurer of $300,000 (negotiable) and a maximum of $1,500,000. Anything over that amount the insurer would assume.

Costs would be figured as follows:

1) basic fee -- negotiable but probably $150,000; 2) loss conversion factor and claims expense fee -- negotiable but around 120% of losses that year; and 3) tax multiplier of 5% -- $79,000 if one assumes losses of $500,000 paid for the year.

If Montana experiences claims for the year totaling $1.2 million, then $200,000 would be paid to the insurer at the end of the year. If claims total $900,000 then Montana would receive $100,000 return at the end of the year. The executive branch could choose to use such a system in Montana if a carrier offered the option.

Whatever the ultimate solution, the insurance of governmental liability risks is likely to be as fraught with difficulty in the future as will be the insurance of other liability risks. The lack of immunity or limits on liability will probably have little effect on the total insurance market prices.

## EXPERIENCES OF OTHER STATES

*GENERALLY*

Other states have struggled with the problem of sovereign immunity. Constitutional sections on sovereign immunity in these states range from no provision to specific abolition, as illustrated below:

> "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Article II, Section 26, Constitution, State of Washington.
>
> "...Suits may be brought against the state in such manner, in such courts, and in such cases as the legislative assembly may, by law, direct." Article I, Section 22, Constitution, State of North Dakota.
>
> "...Suits may be brought against the state in such manner, and in such courts as the legislature may be law direct." Article I, Section 8, Constitution, State of Wyoming. Article I, Section 17, Constitution, State of Tennessee.
>
> "The state of West Virginia shall never be made defendant in any court of law or equity, except that the state of West Virginia, including any subdivision thereof or any municipality therein, or any officer, agent or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee." Article VI, Section 35, Constitution, State of West Virginia.
>
> "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." Article IV, Section 27, Constitution, State of Wisconsin.
>
> "Except as the General Assembly may provide by law, sovereign immunity is abolished." Article XIII, Section 4, Constitution, State of Illinois. Note that while this provision is similar to Montana's it differs in that the specific doctrine of sovereign immunity was abolished while in Montana all immunity was abolished.

California had a provision similar to the North Dakota, Wyoming, and Tennessee provisions, but it was repealed in 1972.

All of these states except Illinois waive the doctrine of sovereign immunity as applied to its tortious acts, with certain exceptions such as errors and omissions of state employees, performance of discretionary functions, tax assessment and collection, intentional torts, punitive or exemplary damages, and national guard activities.

Illinois had a classic sovereign immunity provision in its 1870 constitution: "The state of Illinois shall never be made defendant in any court of law or equity." (Article IV, Section 26.) Under that provision, the legislature established a court of claims with exclusive jurisdiction over all claims against the state and allowed no award over $25,000 for tort claims. Under the 1970 constitutional provision, the same court of claims was retained but the award limit was raised to $100,000. It is interesting to note that neither the old nor new provisions included local governments. Illinois has an elaborate local government and governmental employees tort immunity act (Chapter 85, Section 1, et seq. Revised Statutes of Illinois, 1973).

Generally, other states waive immunity as provided in tort claims acts. Illinois and California have developed extensive acts. States adjacent to Montana have developed acts similar to S.B. 206 as introduced in the 1975 legislative session. Notice requirements in these acts, denying injured persons recovery, have been found unconstitutional. (See Noll case supra p. 9.)

The following information taken from a report by Patton G. Wheeler of the National Association of Attorneys General indicates the legislative response of other states in greater detail.

*STATUTORY PROVISIONS IN THE STATES*

Almost without exception, state legislatures have responded quickly to state court decisions regarding sovereign immunity. When an Arkansas court abrogated the doctrine of sovereign immunity, the legislature immediately reinstated the doctrine, finding the vitality of the principle essential to the fiscal integrity of the state.[1]

A second group of states (see Table) responded by limiting their liability through tort claims acts, a number of which were modeled after the Federal Tort Claims Act. These acts have the effect of reinstating immunity except where the act provides for liability. Twenty states have tort claims acts. Although they differ in a number of particulars, there are significant similarities. For example, there is commonly a requirement that all claims be presented to the relevant state department or agency,[2] which has a specified period of time in which to review the claim and either pay it or deny it. In some states, as soon as the claim is denied by the department, the claimant may seek redress in the courts.[3] In others,[4] a special hearing or appeal board must have reviewed and affirmed the denial of the claim before the jurisdiction of a court may be invoked.

Each act has specific exceptions to liability. These include: discretionary acts within the scope of employment,[5] intentional torts by employees,[6] false imprisonment, malicious prosecution, and invasion of privacy.[7] The Missouri law precludes payments for claims arising because of the operation of a motor vehicle whether privately or publicly owned.

A citizen with a claim arising out of governmental activities would, under general legal principles, have a cause of action against both the employee who was the proximate cause of the injury or damage, and against the governmental entity employing him under the doctrine of respondeat superior. However, as the common law developed, the doctrine of respondeat superior did not apply in the case of a governmental employer. The effect of many tort claims acts is to reinstate the doctrine. For example, the California Act provides that in the absence of fraud, malice, or corruption, the state will represent and indemnify a state employee against whom a claim is brought.[8]

STATE LIABILITY LEGISLATION

| State | Statutory Provision | Coverage |
|---|---|---|
| Alabama | Tit. 35, Sec. 199 | Defense of state militia. |
| Alaska | Tit. 26, Ch. 05 Sec. 140 | A.G. defend militia. |
| Arizona | Sec. 26-159C | A.G. defend militia. |
| | Sec. 41-192.02 | A.G. has discretion to represent state employees. |
| Arkansas | Sec. 11-1008 | A.G. or appointed counsel defend militia. |
| | Sec. 12-2901 | Immunity doctrine asserted. |
| California | Gov't. Code Sec. 810 et seq. | Tort Claims Act |
| Colorado | Sec. 24-10-101 et seq. | Governmental Immunity Act. |
| | Sec. 24-10-110 | Defense of public employees. |
| | Sec. 28-3-502 | A.G. may recommend defense of military personnel. |
| Connecticut | Sec. 4-165 | Immunity for state officers and employees in line of duty except for wanton or willful acts. |
| | Sec. 3-125 | A.G. appears when state is a party to suits against state officials. |
| Delaware | No statutory provision | |
| Florida | Sec. 111.07 | State agencies may authorize defense of officers or employees sued for acts within the scope of employment in absence of wanton or willful misconduct. |
| | Sec. 250.31 | Defense of state militia. |
| Georgia | Sec. 89-920 | Defense by A.G. of public officer sued for acts pursuant to his duties. |
| | Sec. 86-11-1 | A.G. defend state militia. |
| Hawaii | Ch. 662 | Tort Claims Act. |
| Idaho | Tit. 6, Ch. 9 | Tort Claims Act. |
| Illinois | Ch. 85 | Tort Claims Act. |
| | Ch. 129 Sec. 220.90 | Defense of state militia. |
| Indiana | Sec. 49-1902a | A.G. defend official or employee for suits arising within scope of employment. |
| | Sec. 45-2104 | A.G. defend militia. |
| Iowa | Ch. 25A.1 et seq. | Tort Claims Act |
| | Ch. 25A (new section) | State will defend and indemnify all state employees against claim arising out of act or omission occuring within scope of employment, will not indemnify for acts of malfeasance or willful and wanton conduct. |

(Cont'd. next page)

STATE LIABILITY LEGISLATION

| State | Statutory Provision | Coverage |
|---|---|---|
| Iowa (Cont'd.) | Ch. 25A (new section) | State shall defend and indemnify any state employee sued under 42 U.S.C. Sec. 1983 for acts or omissions within scope of employment; will not indemnify for malfeasance in office or willful or wanton conduct. |
| Kansas | Sec. 75-3217 | State defends law enforcement and corrections personnel in suits arising from acts within scope of employment. |
| Kentucky | Ch. 44.010 et seq. | Sovereign immunity waived up to $20,000 in damages; board of claims hears cases, at which A.G. shall defend claims for commonwealth, department, or agency. |
| Louisiana | 49.461 | A.G. may defend civil actions against state ministerial officers in their official capacity. |
| | 29.70 | A.G. defend state militia. |
| Maine | Tit. 37A, Sec. 211 | A.G. defend state militia. |
| Maryland | Art. 32A | A.G. on request may defend action against officer or employee within scope of employment. |
| Massachusetts | Ch. 12 Sec. 3 | A.G. must appear on behalf of officers whose official acts are challenged. |
| | Ch. 12 Sec. 3b | A.G. on request may defend correctional and health officials sued for acts in scope of employment. |
| Michigan | Sec. 691.1408 | State agency may provide for representation of officer or employee sued for acts in scope of employment. |
| | Sec. 4.678(179)(d) | A.G. required to defend militia. |
| Minnesota | Sec. 3.66 | State claims commission established to hear claims and compensate persons injured. |
| | Sec. 15.181 | State provides defense of non-elected state employees for actions arising from employment. |
| | Sec. 192.29 | A.G. may recommend representation of militia. |

STATE LIABILITY LEGISLATION

| State | Statutory Provision | Coverage |
|---|---|---|
| Mississippi | No statutory provision re state | |
| | Sec. 25-1-47 | Municipalities may provide for defense of their employees. |
| Missouri | Sec. 105.710 | Tort Defense Fund to pay judgments against officers or employees of militia, health and corrections divisions. |
| Montana | Sec. 82-4301 et seq. | Tort Claims Act. |
| Nebraska | Sec. 81-857 et seq. | Tort Claims Act. |
| Nevada | Sec. 228.140 | A.G. defend official sued in official capacity. |
| | Sec. 41.031 | State waives immunity for torts. |
| | Sec. 41.038 | State or subdivisions may insure employees. |
| New Hampshire | Sec. 412:3 | State may procure liability insurance. |
| New Jersey | Tit. 59-1 | Tort Claims Act. |
| New Mexico | Sec. 4-3-16 | A.G. on request defend officers or employees when acting within scope of employment. |
| | Sec. 5-6-19 | State authorized to insure employees against tort liability. |
| New York | Sec. 17 Public Officers Law | Tort Claims Act. |
| North Carolina | Sec. 143-291 et seq. | Tort Claims Act. |
| North Dakota | Sec. 54-12-01 | A.G. must defend actions against state officers in official capacity. 1975 law provides that waiver of immunity limited to types of insurance purchased and to extent of policy limits of such coverage. |
| Ohio | Sec. 2743.01 et seq. | Tort Claims Act. |
| Oklahoma | Tit. 74 Sec. 18c | A.G. must defend on request state officer sued in official capacity. |
| | Tit. 11 Sec. 1175 et seq. | Municipal Tort Liability Act. |
| Oregon | Sec. 243.510 | A.G. must represent on request officer or employee for torts committed within scope of employment. |

| State | Statutory Provisions | Coverage |
|---|---|---|
| Pennsylvania | No statutory provision | Executive Board Order establishes guidelines for A.G. representation of state employees. Proposed guidelines issued pursuant to Exec. Board Order would establish Board of Employee Liability Review which will hear claims against public employees. |
| Rhode Island | Sec. 42-9-6 | A.G. must defend state officials sued in official capacity. |
| | Tit. 9 Ch. 31 | Abolishes governmental tort immunity. |
| | Sec. 9-31-2, 9-31-3 | $50,000 limit on recovery; no limitation on claims arising out of proprietary functions. |
| South Carolina | Secs.10-2621-10-2625 | Motor Vehicle Tort Claims Act. |
| | Sec. 1-234 | A.G. on request defend officer or employee for acts done in scope of employment. |
| South Dakota | Sec. 3-19-1 | When officer or employee sued, state may (1) pay or indemnify for cost of defense, (2) pay or indemnify for judgment or settlement. |
| | Sec. 33-6-4 | State defend militia. |
| Tennessee | Sec. 23-3301 et seq. | Tort Claims Act. |
| | Sec. 23-3303 | After Jan. 1, 1976, Tennessee Governmental Tort Liability Act will apply without exception to all political subdivisions in the state. |
| | Sec. 7-143 | State defends militia |
| Texas | Tit. 110A, Art. 6252-19 | Tort Claims Act. |
| | S.B. No. 104 (1975) | State defends and indemnifies employees of specified state agencies and employees of state institutions of higher education who are involved in health related activities in suits alleging |

(Cont'd. next page) medical malpractice or

STATE LIABILITY LEGISLATION

| State | Statutory Provision | Coverage |
|---|---|---|
| Texas (cont'd.) | | deprivation of right, etc. secured by constitution or laws of Texas or United States; does not include damages proximately caused by willful and wrongful act or gross negligence. |
| Utah | Sec. 63-30-3 | Governmental Immunity Act. |
| | Sec. 67-5-1 | A.G. must defend suits to which state or officer in official capacity is party. |
| Vermont | Tit. 12 Secs. 5601-5605 | State allows tort claims up to $75,000 per person or $300,000 per occurrence. |
| | Sec. 5602 | Excludes certain classes of claims from coverage. |
| | Tit. 3, Sec. 1101 | State must provide counsel for employee sued for acts within scope of employment, except to the extent that such representation is provided by an insurance carrier. |
| Virginia | Sec. 21-121 | A.G. represent state officials in all civil litigation to which they are parties. |
| | Sec. 44-100 | A.G. approve counsel to defend militia. |
| Washington | Sec. 4.92.060 | State officer or employee may request state to defend him in actions arising out of official duties. |
| West Virginia | Sec. 5-3-2 | A.G. must defend all actions against state officers in his official capacity, as well as actions against the militia. |
| Wisconsin | Sec. 165.25(6) | A.G., upon request of department, represent employee charged with enforceing the law or a tort action. |
| Wyoming | Sec. 9-125(a) | A.G. must defend state officer sued in their official capacity. |

In the states with tort claims acts, the role of the Attorney General is clearly spelled out. When the claim is against the state, the Attorney General provides representation. When the claim is against an officer or employee, the Attorney General will provide representation upon request when he has determined that the case comes within the provisions of the Act.

In the remaining group of states (see Table) which do not have a tort claims act as such, the Attorney General's role differs markedly from state to state. Generally, however, the statutes provide the Attorney General with the authority to represent all state officials and employees who are the subject of civil litigation resulting from activities within the scope of their employment when the employee so requests. Colorado's law gives the public entity the discretion to decide whether it will or will not assume the defense of the public employee. Whether or not the public entity elects to represent the defendant, it shall be liable for the costs of the defense of its employees. A few states (North Dakota, Oklahoma, Rhode Island, Virginia, and West Virginia) distinguish between state officials and employees, and authorize representation only for officials.

As part of his role as counselor, the Attorney General of several states is granted the authority to compromise or settle claims. The Attorney General of Colorado may compromise and settle a claim against the state with the concurrence of the head of the affected department or agency. In Missouri the Attorney General may compromise any claim made which he deems to be valid under the Tort Defense Fund Law.

The number of states which have established special tribunals to hear claims is small but steadily increasing. Nine states (Illinois, Kansas, Kentucky, Minnesota, Missouri, New York, North Carolina, Ohio, and Tennessee) currently have such tribunals, and a constitutional amendment was recently approved in Georgia which authorizes the state's general assembly to provide by law a state court of claims to hear suits brought against the state. Thus far, however, no such legislation has been enacted. Proposed guidelines issued pursuant to a Pennsylvania Executive Board Order would establish a Board of Employee Liability Review to hear claims against public employees. This trend confirms the findings of the California Law Review Commission Report, which stated:

> The principal arguments in favor of a special court are ...relieving the courts from the burden of governmental tort litigation, providing assurance that tort claims against governmental entities will be decided from a uniform point of view divorced from local prejudices and attitudes, and developing a degree of expertise in adjudicating such claims which may be expected to come through specialization....careful studies have disclosed no basis for believing that, with minor procedural modification, the judiciary would not be fully capable of handling

the burden of whatever litigation an expansion of governmental tort liability might generate.[9]

Indeed, tort claims litigation may eventually reach the regular court system even in states with special tribunals. For example, in Tennessee appeals may be taken from the Board of Claims (in North Carolina from the Industrial Commission) to the courts of general jurisdiction. The New York Court of Claims can only hear claims against the state, so claims against state employees must be brought in the regular court system.

The largest group of states are the twenty-three which have legislation concerning the liability and representation of state officials and employees. Although generalizations are difficult and sometimes misleading, these statutes basically provide for representation by the Attorney General when a state official or employee is sued for damages or injury resulting from an act within the scope of his employment. Immunity is not characteristic of such statutory provisions, except when the act can be characterized as discretionary. However, states do generally carry insurance to protect their employees.

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FOOTNOTES

[1]Ark. Stat. Ann. Sec. 12-2901 (Supp. 1969).

[2]Tenn. Code Ann. Sec. 23-3314.

[3]Utah Code Ann. Sec. 63-30-12.

[4]Iowa Code Ann. ch. 25A3.

[5]Cal. Gov't. Code Sec. 820.2.

[6]Vt. Stat. Ann. Sec. 5602.

[7]Iowa Code Ann. ch. 25A14.

[8]Cal. Gov't. Code Sec. 815.2.

[9]Cal. L. Rev. Comm'n., A Study Relating to Sovereign Immunity, (1963).

## ALTERNATIVE FORMS OF SPECIFICALLY PROVIDING SOVEREIGN IMMUNITY

There are several approaches to establishment of sovereign immunity in specific instances. Four approaches will be considered: (1) no immunity, (2) immunity based upon traditional categories, (3) immunity from certain types of damages and (4) a worker's compensation type system for tortious governmental actions.

### *NO IMMUNITY*

This alternative currently exists in the state of Montana and its political subdivisions. The effects of this situation are not clear because the extent of sovereign immunity prior to the new constitution and the intent of its abrogation are not defined. If immunity prior to the constitutional change included protection for the legislative branch of government to make policy without fear of suit, the judicial branch of government to interpret laws without fear of suit, and the executive branch of government to make basic administrative decisions without fear of suit, then its abrogation has thrown the state into a unique legal and financial position: the government's right to govern would be within the scope of the doctrine of immunity and any person believing himself injured by the vagaries of the political process could collect awards.

This right of the government to govern has not been considered, for legislative and judicial actions, within sovereign immunity.

In general, executive branch actions -- particularly where discretion plays a role produced the major development in sovereign immunity doctrine in the United States, which was carried into Montana. In carrying out its duties, the executive branch would act in a manner that caused injury to a person and as long as the action had a hint of discretion about it, sovereign immunity was applied. As sovereign immunity began to lose favor with citizens, judges, and commentators, areas of discretion were found to be "ministerial" or areas of "governmental" functions were found to be "proprietary". That these distinctions were extremely difficult to define in specific situations merely led to ambiguous rules of law, rather than a clearcut limitation on the application of sovereign immunity. The end result in most states was judicial or legislative abrogation of the doctrine. In Montana, a constitutional section dealt the doctrine its final blow. But immunity, as it originally existed, probably included more than executive actions and the implications of that fact are difficult to fathom.

### *IMMUNITY BASED UPON TRADITIONAL CATEGORIES*

This alternative provides a wide range of possibilities. Immunity

decisions can be made along lines patterned after the traditional "governmental-proprietary" distinction. The old governmental categories are the most likely to be granted immunity. Thus, immunity could be specifically provided for the state and its political subdivisions for negligent acts arising from law enforcement, fire protection, highway construction and maintenance, and so on. It is also possible to provide immunity for discretionary acts of state employees and employees of political subdivisions. Other categories for possible immunity are errors and omissions where due care is exercised; collection of taxes or fees; detention of goods or merchandise; declaration of embargo or quarantine; intentional torts committed by employees; National Guard activities; riots; mob violence; or the operation of transportation systems by political subdivisions. These are but a few of the possibilities;* however, the use of the governmental-proprietary dicotomy requires specifications of particular immunities rather than the broad categories because of the fact that the distinction is so clouded in the law as to be practically meaningless.

Discretionary acts of state employees is also a difficult area for consideration because it is difficult to determine where discretion ends and what type of "discretion" is the proper area for immunity. Should the discretion inherent in carrying out and administering policy and law, on a day-to-day basis, as defined by the legislature and courts be included, or the discretion used in developing basic administrative approaches to fulfillment of law and policy, or the discretion that molds the previous two into an indistinguishable whole? The answer varies with the case, or the governmental entity, or the governmental function.

The Federal Tort Claims Act, 28 USCA 2671 et seq., devotes several pages to court cases interpreting the discretionary exclusion in that act. The focus of concern is the extent and area of discretion. A student of the Federal Tort Claims Act has stated the discretionary exclusion provided in 28 USC 2680(a) "covers mistakes in judgment of governmental officials acting in administrative or regulatory or quasi-legislative capacities in areas in which the courts have traditionally refrained from substituting their judgment for that of officials empowered by law to make the determination which may result in claimant's injury." (Handling Federal Tort Claims: Administrative and Judicial Remedies, Vol. 2, Lester S. Jayson.) Jayson finds the application of the discretionary exclusion covers three general areas: "(1) claims based upon decisions of administrators; (2) claims based upon the regulatory conduct of regulatory agencies or officials; and (3) claims arising from the design and execution of public works." In general terms, "courts will not interfere with, or revise, supervise, or control executive conduct involving the exercise of judgment, choice, or discretion of a public character."

This definition may explain what has happened at the federal level

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*See list of possibilities in the next section.

but it does not clarify the dividing line between liability and no liability. The state of Washington attempted to clarify this issue in Section 4.92.090 RCW as amended in 1963. This section makes the state of Washington liable for damages "arising out of its tortious conduct to the same extent as if it were a private person or corporation." Yet, as clear as those words appear, the question of discretionary acts was decided by the court in favor of immunity. The case, Evangelical United Brethern Church v. State, 407 P.2d 440, 67 Wn2d 246 (1965), involved the actions of state officials in operation of a juvenile correction facility and their care in providing security measures of a "pyromaniac". Plaintiff alleged, *inter alia*, negligence on part of the state for maintenance of its particular program and assignment of the person to that program. The state defended with the contention "that the decisions, acts, or omissions complained of involve the exercise of administrative judgment and discretion and cannot properly be characterized as tortious conduct..." Evangelical at 443. The state appealed after denial of its motions and judgment for plaintiff. The Supreme Court of Washington found limitations inherent in the wording of 4.92.090 RCW and decided it "is not as broad as it could possibly be written." After discussion of the Federal Tort Claims Act, the court set out four preliminary questions to be answered in the affirmative before an act by a state official may be considered discretionary. These questions follow: "(1) Does the challenged act, omission or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of that policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?" The court then answered the questions in the affirmative and reversed the lower court ruling. The decision was not unanimous. In a strong statement, the sole dissenter indicated the majority decision was both "unfortunate and unwarranted in view of the language actually utilized by our state legislature in describing the ambit of the state's tort liability." He pointed out the difficulty in finding limitations in the wording of section 4.92.090 RCW and concluded by deriding the majority's distinction.

Someone must have heard the dissent. A later case, King v. City of Seattle, 525 P.2d 228, 84 WN2d 882, (1974), added a refinement to the above questions. Pointing to a California decision, Johnson v. State, 69 Cal.2d 781, 73 Cal. Reptr. 240, 447 P.2d 352 (1968), the court cited the following guideline: "to determine whether an act is discretionary or not...find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision", King at 233. The court then said that immunity could

only apply to a quasi-legislative policy decision upon a showing that the state [local entity] consciously engaged in "balancing risks and advantages."

Thus, Washington has legislatively abolished sovereign immunity, with a judicial limitation as to discretionary acts. These acts are defined to conform to a "discretionary-ministerial" dichotomy, with the refinement that there must be conscious balancing of risks and disadvantages before immunity applies, at least for quasi-legislative functions.

Would such statutes, decisions, and limitations help us in Montana? Yes, but only partially. The excision of discretionary acts from the Washington statute shows there is still question of the extent of total abolition of sovereign immunity. They also show there is no easy line to draw when one seeks to draw it.

Another method of viewing the problem is to label as discretionary functions or duties those prerogatives of the executive that are parallel to policy-making in the legislature and legal interpretation in the judiciary. All other acts, are discretionary acts for which liability may result. This line would not help a great deal but it would continue in the spirit of letting the government govern, while providing recourse for the government's negligent acts.

Other categories have also drawn attention. Professional malpractice and errors and omissions of state employees had been included within the doctrine of immunity. There appears to be no substantial reason to allow a person injured by a negligent physician or attorney or other professional to sue and collect an award for that injury if the professional is in non-government work, yet deny the same person recovery if the professional is employed by a governmental entity. In either case, the injury is as great, the loss is as great, and the need for competent professionals is as great.

Highway construction and maintenance has been another source of contention in sovereign immunity. The problem usually centers upon the governmental entities' failure to take necessary precautions to warn motorists of ongoing repairs, changes in route, temporary detours, and so on. As highway maintenance had traditionally been categorized as a "governmental" function, immunity applied. The arguments for denying immunity are the same as those for denying immunity to professionals for their negligence: this is not an area of discretion; very little degree of judgment is required; and persons are not likely to avoid governmental employment because of suits. The equity of allowing recovery is also present.

The question of design -- with potential scope far greater than that of highway construction and maintenance -- has also arisen. California and Illinois have enacted a design immunity statute to deal with the question. California's statute was judicially interpreted to allow design immunity so long as conditions have

not changed, Baldwin v. State, 99 Cal. Rptr. 145, 491 P.2d 1121, 6C. 3rd 424.* The argument remains that the entity utilizing a properly prepared design, developed within reasonable and current standards, should be allowed immunity for negligent defects in the design.

Procedural limitations are also possibilities. Obviously filing deadlines do not meet constitutional muster. A surety bond or other form of security as required in Washington state could be instituted. This would discourage spurious claims, but, it should be noted that this device could not be used to deny those persons without financial redress the opportunity to seek redress.

*IMMUNITY FROM CERTAIN TYPES OF DAMAGES*

An alternative to the institution of immunity for specific categories of governmental actions is to limit the types of damages a person injured by governmental negligence can recover. One method of achieving this alternative is to allow award of tangible damages while limiting or denying awards of intangible damages. The rationale for this form of immunity is based on the genuine need to "make whole" the injured party or survivors, while attempting to control the possible devastating financial effects of enormous awards. Tangible damages can be documented and computed with reasonable accuracy. Intangible damages are usually limited by the particular jury deciding the facts. In recent years, juries have awarded larger amounts for intangible damages.

An argument against this alternative focuses upon the party with the "deepest pockets". The governmental entity is most often the party with the greatest financial capability (deep pockets) when compared to a private citizen or a government employee; thus, the state can more easily pay for injury to a person. This argument is also based on the theory that a negligent party should be responsible for his acts. The problem occurs in carrying the argument to its fullest extent because large sums of money might have to be raised or diverted to pay an award to an injured person. The diversion or

*In Baldwin a pickup truck was struck from the rear while waiting in the left lane of a major thoroughfare to make a left turn. Conditions had changed significantly since the road was designed and built, and the state highway department knew of the changed conditions. The California Supreme Court held: "a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it..." Baldwin supra at 1130.

raising of these sums might force the government to curtail services provided to the state's citizens. Insurance is only a partial answer since the cost of premiums is high and some tortious actions are not covered. When insurance fails, the state pays.

A major concern in limiting damages to tangible ones is how to handle pain and suffering and injury to reputation. These types of damages are very difficult to calculate with accuracy, yet they are maybe the only injury suffered. One method of approach is to place a ceiling on awards for intangible damages. Thus, an injured person could hold the state responsible for all tangible damages suffered as the proximate result of the government's negligent action any intangible damages to a specified ceiling.

*WORKERS' COMPENSATION TYPE SYSTEM*

In this alternative, all valid claims for injury from tortious governmental action would be compensated according to a predetermined formula. The determining question in awarding a claim would be the causation of injury: when negligence of the government or its employees is the proximate cause, then the injured party may collect for that injury; when the government or its employees is not the proximate cause, then no recompense would be granted.

It would be necessary to set up an agency; or expand an existing one, to administer this alternative. Immunity would be established for tortious acts resulting in injuries not within the jurisdiction of the agency.

No other state has established a system modeled on the workers' compensation system.

*SPECIAL CONSIDERATIONS CONCERNING POLITICAL SUBDIVISIONS*

The position of political subdivisions, particularly counties, school districts and municipalities, is of major concern since these entities have traditionally been shielded by some form of sovereign immunity in this state. The plunge into no immunity at the same time the whole liability insurance industry is experiencing unprecedented growth in premiums generally has been a sudden shock. Financially, few political subdivisions are prepared to pay the premiums currently asked by insurers for liability coverage. Financial reserves to cope with large adverse settlements are limited if they do exist. The optimum alternative for many political subdivisions would be complete immunity. As Dean Zinnecker put it: the counties would like as much immunity as they can get.

However, complete immunity never existed for municipalities. Establishing complete immunity now would deny the basic purpose of the constitutional provision itself.

Alternatives as applied to political subdivisions turn on whether these entities were included in the doctrine of sovereign immunity or not. Some states excluded all but state government from the shield of sovereign immunity. Montana did not: immunity granted or limited at the state level was also granted or limited at the local level. The exception to this doctrine lay with "proprietary" functions.

The option of allowing immunity at the state level while denying it at the local level is now even less viable than in the past. Development of the "equal protection" clause of the U.S. Constitution has led some commentators to see this split of immunity as unconstitutional. The same argument can be made under the Montana constitution.

Alternatives for political subdivisions depend upon who supplies the funds to insure, and to what limits. Local entities feel that when they are carrying out state laws they should receive state support for liability insurance, whether in the form of sharing of costs, state provision of insurance above a certain monetary level, or some other method.

However, to bring the state into full, or even partial, participation in insurance coverage would mean that state policy and decisions will supplant local policy and decisions in those areas where liability exposure is greatest. The state would have a legitimate interest in maintaining exposure at its lowest level and would undoubtedly exert pressure to compel local entities to conform.

*SPECIFIC AREAS WHERE IMMUNITY HAS BEEN GRANTED IN OTHER JURISDICTIONS*

Generally, the action in specific areas granted immunity involve negligence but not gross negligence or intent. However, some of these immunities include intentional action. This inclusion applies to employees when the governmental entity is liable for that action.

Specific Immunities

1) punitive or exemplary damages

2) adoption or failure to adopt a law

3) issue, denial, suspension or revocation of a permit

4) inspection of property, or failure to make, or negligent inspection

5) oral promise or misrepresentation by an employee

6) libel or slander

7) grant or failure to grant public welfare monies

8) acts or omissions of employees or other persons' discretionary acts

9) execution or enforcement of law

10) acts under unconstitutional, invalid or unapplicable law

11) institution or prosecution of judicial or administrative proceeding

12) entry upon real property

13) negligent misrepresentation by an employee

14) school safety patrol operation

15) certain joint actions

16) maintenance of public property unless actual or constructive notice

17) reasonable plan or design

18) failure to provide traffic signals and signs

19) use of streets - weather conditions

20) property used for recreational purposes

21) access trails or roads

22) failure to supervise activity or use of property

23) failure to provide police protection

24) failure to provide detention or correctional facilities

25) negligent interference with right of a prisoner to obtain a judicial determination

26) failure to provide medical care to a prisoner

27) actions of prisoner on parole or escaped

28) failure to make an arrest, or release of a prisoner

29) failure to establish fire department

30) failure to suppress or contain fire

31) condition of fire protection or firefighting equipment

32) failure to provide adequate health facilities or equipment

33) discretionary act in controlling disease

34) preventive physical or mental examinations

35) diagnosis or failure to diagnose illness or addiction

36) confinement of person for mental illness or addiction

37) injury caused to or by escaped mental patient

38) for damages in excess of insurance purchased

39) for damages beyond $xxxx each claim

40) money stolen from official custody

41) administration of tax laws

This is not a complete list for the number of specific areas possible is limited only by a drafter's imagination.

in those programs, consistent with sub-section (1) of this section. These guidelines shall be adopted as rules and published in a manner which may be provided to a member of the public upon request.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975.

82-4229. Enforcement. The district courts of the state have jurisdiction to set aside an agency decision under this act upon petition of any person whose rights have been prejudiced made within thirty (30) days of the date of the decision.

History: En. 82-4229 by Sec. 4, Ch. 491, L. 1975.

## CHAPTER 43—STATE INSURANCE PLAN AND TORT CLAIMS



82-4301. Short title. This act shall be known and may be cited as the "Montana Comprehensive State Insurance Plan and Tort Claims Act."

History: En. Sec. 1, Ch. 380, L. 1973.

Title of Act

An act providing for a comprehensive state insurance plan and tort claims procedure to be known as the "Montana Comprehensive State Insurance Plan and Tort Claims Act."

82-4302. Definitions. As used in this act:

(1) "State" means the state of Montana or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.

(2) "Political subdivision" means any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation.

(3) "Governmental entity" means and includes the state and political subdivisions as herein defined.

(4) "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.

(5) "Personal injury" means any injury resulting from libel, slander, malicious prosecution, or false arrest, any bodily injury, sickness, disease or death, sustained by any person and caused by an occurrence, for which the state may be held liable.

(6) "Property damage" means injury or destruction to tangible property, including loss of use thereof, caused by an occurrence, for which the state may be held liable.

(7) "Claim" means any claim against a governmental entity, for money damages only, which any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of his employment, under circumstances where the governmental entity, if a private person, would be liable to the claimant for such damages under the laws of the state of Montana.

History: En. Sec. 2, Ch. 380, L. 1973.

**82-4303. Comprehensive insurance plan for state—risks insured—deductible insurance.** The department of administration shall be responsible for the acquisition and administration of all the insurance purchased for protection of the state, as defined herein.

The department of administration shall, after consultation with the departments, agencies, commissions, and other instrumentalities of the state, provide a comprehensive insurance plan for the state providing insurance coverage to the state in amounts determined and set by the department of administration and shall have the authority to purchase, renew, cancel and modify all policies according to the comprehensive insurance plan. The plan may include property, casualty, liability, crime and fidelity, and any such other policies of insurance as the department of administration may from time to time deem reasonable and prudent.

The department of administration may in its discretion elect to utilize a deductible insurance plan, either wholly or in part. Such a plan shall never have a deductible amount in excess of twenty-five thousand dollars ($25,000) per occurrence, and shall contain provisions allowing for an aggregate deductible amount not to exceed two hundred fifty thousand dollars

($250,000) annually under each type of insurance as enumerated in the preceding paragraph.

History: En. Sec. 3, Ch. 380, L. 1973; amd. Sec. 1, Ch. 143, L. 1974.

Amendments

The 1974 amendment inserted "purchased for protection" in the first paragraph; and substituted "determined and set by the department of administration" in the first sentence of the second paragraph for "not less than the minimum specified in section 7 [82-4307] of this act."

82-4304. Compliance with state plan required. Only the state department of administration may procure insurance under this act except as otherwise provided herein.

All offices, departments, agencies, authorities, commissions, boards, institutions, hospitals, colleges, universities and other instrumentalities of the state hereafter called state participants shall comply with this act and the insurance plan developed by the department of administration.

History: En. Sec. 4, Ch. 380, L. 1973.

82-4305. Apportionment of costs—creation of reserve if deductible plan elected. The department of administration shall apportion the costs of all insurance purchased under this act to the individual state participants and the costs shall be paid to the department.

The department of administration, if it elects to utilize a deductible insurance plan, is authorized to charge the individual state participants an amount equal to the cost of a full-coverage insurance plan, until such time as a reserve in the amount of two hundred fifty thousand dollars ($250,000), the amount of the total aggregate annual deductible, is created. In each subsequent year, the department shall be authorized to charge a sufficient amount over the actual cost of the deductible insurance to replenish such reserves.

History: En. Sec. 5, Ch. 380, L. 1973.

82-4306. Political subdivisions. All political subdivisions of the state shall have the authority to procure insurance under this act.

History: En. Sec. 6, Ch. 380, L. 1973.

82-4307. Repealed.

Repeal

Section 82-4307 (Sec. 7, Ch. 380, L. 1973), relating to the required limits of coverage, was repealed by Sec. 2, Ch. 143, Laws of 1974.

82-4308. Conditions construed in compliance with act—customary exclusions. Any insurance policy, rider or endorsement hereafter issued and purchased to insure against any risk which may arise as a result of the application of this act, which contains any condition or provision not in compliance with the requirements of this act, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this act, provided the policy is otherwise valid. This section shall not be construed to prohibit

any such insurance policy, rider or endorsements from containing standard and customary exclusions of coverages which the department of administration deems to be reasonable and prudent upon considering the availability and the cost of such insurance coverages.

History: En. Sec. 8, Ch. 380, L. 1973.

82-4309. Political subdivision tax levy to pay premiums. Notwithstanding any provisions of law to the contrary, all political subdivisions shall have authority to levy an annual property tax in the amount necessary to pay the premium for insurance as herein authorized, even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded thereby; provided, that the revenues derived therefrom may not be used for any other purpose.

History: En. Sec. 9, Ch. 380, L. 1973.

82-4310. Governmental entities liable for torts. Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.

History: En. Sec. 10, Ch. 380, L. 1973.

82-4311. Filing of claims against state—time of filing. All claims against the state arising under the provisions of this act shall be presented to and filed with the secretary of state within one hundred twenty (120) days from the date of the occurrence from which the claim arose or when the injury should reasonably have been discovered, whichever is later. A fee of ten dollars ($10) shall be paid to the secretary of state at the time the claim is presented for filing.

History: En. Sec. 11, Ch. 380, L. 1973; amd. Sec. 1, Ch. 361, L. 1975.

Amendments

The 1975 amendment added the second sentence.

Constitutionality

This section is unconstitutional since it creates a condition precedent to governmental waiver of immunity, in conflict with article II, section 18 of the 1972 Montana constitution; the correct statute of limitations for tort actions against governmental entities is 82-4317, R. C. M. 1947. Noll v. City of Bozeman, — M —, 534 P 2d 880.

82-4312. Filing of claims against political subdivisions—time for filing. All claims against a political subdivision arising under the provisions of this act shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred twenty (120) days from the date of the occurrence from which the claim arose or when the injury should reasonably have been discovered, whichever is later.

History: En. Sec. 12, Ch. 380, L. 1973.

Actual Knowledge

Although plaintiff had not filed formal claim against city within the time limit prescribed, issues of fact as to the fact and extent of knowledge by city that plaintiff was injured precluded summary judgment. State ex rel. City of Bozeman v. District Court, — M —, 531 P 2d 1343.

82-4313. Contents of claim—agent filing—inaccuracies. All claims presented to and filed with a governmental entity shall accurately describe

the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time of the occurrence from which the claim arose. If the claimant is incapacitated and unable to present and file his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

History: En. Sec. 13, Ch. 380, L. 1973.

82-4314. Late claims not allowed. No claim or action shall be allowed against a governmental entity unless the claim has been presented and filed within the time limits prescribed by this act.

History: En. Sec. 14, Ch. 380, L. 1973.

Constitutionality

This section is unconstitutional since it creates a condition precedent to governmental waiver of immunity in conflict with article II, section 18, of the 1972 Montana constitution. Noll v. City of Bozeman, — M —, 534 P 2d 880.

82-4315. Approval or denial of claim—notice. The governmental entity shall act within sixty (60) days after the filing of the claim, if at all, and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of sixty (60) days the governmental entity has failed to approve or deny the claim.

History: En. Sec. 15, Ch. 380, L. 1973.

82-4316. Action after denial of claim. If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances where an action is permitted by this act.

History: En. Sec. 16, Ch. 380, L. 1973.

82-4317. Limitation of actions on claims. Every claim against a governmental entity permitted under the provisions of this act shall be forever barred unless an action is begun within two (2) years after the claim is filed with the governmental entity.

History: En. Sec. 17, Ch. 380, L. 1973.

Correct Limitation

This section establishes the correct statute of limitation for Montana tort actions against any government entity. Noll v. City of Bozeman, — M —, 534 P 2d 880.

82-4318. Compromise or settlement of claim against political subdivision. The governing body of each political subdivision, after conferring

with its legal officer or counsel, may compromise and settle any claim allowed by this act, subject to the terms of the insurance, if any.

History: En. Sec. 18, Ch. 380, L. 1973.

82-4319. Compromise or settlement of claim against state. The department of administration may compromise and settle any claim allowed by this act, subject to the terms of insurance, if any.

History: En. Sec. 19, Ch. 380, L. 1973.

82-4320. Jurisdiction of district court—rules of procedure. The district court shall have jurisdiction over any action brought under this act and such actions shall be governed by the Montana Rules of Civil Procedure in so far as they are consistent with this act.

History: En. Sec. 20, Ch. 380, L. 1973.

82-4321. Venue of actions. Actions against the state shall be brought in the county in which the cause of action arose or in Lewis and Clark County. In addition, a resident of the state of Montana may bring an action in the county of his residence.

Actions against a political subdivision shall be brought in the county in which the cause of action arose or in any county where the political subdivision is located.

History: En. Sec. 21, Ch. 380, L. 1973.

82-4322. Service of summons on state. In all actions against the state, the state shall be named the defendant, and the summons shall be served on the secretary of state.

History: En. Sec. 22, Ch. 380, L. 1973.

82-4322.1. Legislative purpose. It is the purpose of this act to provide for the immunization and indemnification of public officers and employees sued for their actions, other than intentional tort or felonious acts, taken within the course and scope of their employment.

History: En. 82-4322.1 by Sec. 1, Ch. 239, L. 1974.

Title of Act

An act to amend section 82-4323, R. C. M. 1947, to provide that a governmental entity employer must be joined as party defendant in certain actions; providing immunity from personal liability or from suit for governmental entity employees in certain cases; providing for indemnity in certain cases; and providing an effective date.

82-4323. Governmental entity to be joined as defendant—employees immune from personal liability or from suit in certain cases—recovery against governmental entity bar to recovery against employee—indemnity. (1) In an action brought against any employee of a state, county, city, town or other governmental entity for a negligent act, error or omission, or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity employer shall be made a party defendant to the action.

(2) Recovery against a governmental entity under the provisions of this act shall constitute a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, or omission or other actionable conduct gave rise to the claim. In any such action against a governmental entity, the employee whose conduct gave rise to the suit shall be immune from suit by reasons of the same subject matter, if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of such employee's employment, unless the claim is based upon an intentional tort or felonious act of the employee.

(3) In any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee.

History: En. Sec. 23, Ch. 380, L. 1973; amd. Sec. 2, Ch. 239, L. 1974.

Amendments

The 1974 amendment inserted subsection (1); inserted "or recovery of damages" in the first sentence of subsection (2) after "any action"; inserted "error" and "or other actionable conduct" near the end of the first sentence of subsection (2); added the second sentence of subsection (2); and added subsection (3).

Effective Date

Section 3 of Ch. 239, Laws of 1974 provided the act should be in effect from and after its passage and approval. Approved March 21, 1974.

82-4324. Punitive damages, attorney fees, interest. Governmental entities shall not be liable for punitive damages, attorney fees or interest on any claim allowed under the provisions of this act.

History: En. Sec. 24, Ch. 380, L. 1973.

82-4325. Recovery from appropriations if no insurance. In the event no insurance has been procured by the state to pay a claim or judgment arising under the provisions of this act, the claim or judgment shall be paid from the next appropriation of the state instrumentality whose tortious conduct gave rise to the claim.

History: En. Sec. 25, Ch. 380, L. 1973.

82-4326. Political subdivision tax levy to pay claim. Notwithstanding any provisions of law to the contrary and in the event there are no funds available, the political subdivision shall levy and collect a tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act where the political subdivision has failed to purchase insurance to cover a risk created under the provisions of this act.

History: En. Sec. 26, Ch. 380, L. 1973.

Separability Clause

Section 27 of Ch. 380, Laws 1973 read "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

82-4327. Attachment, execution. No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity under this act.

History: En. Sec. 28, Ch. 380, L. 1973.

CHAPTER 44—WESTERN INTERSTATE NUCLEAR COMPACT

Section
82-4401. Western interstate nuclear compact adopted—text.
82-4402. Board member appointed by governor—compensation.
82-4403. Bylaws and amendments filed with secretary of state.

82-4401. Western interstate nuclear compact adopted—text. The western interstate nuclear compact is entered into and adopted as follows:

## WESTERN INTERSTATE NUCLEAR COMPACT

### ARTICLE I.

### Policy and Purpose

The party states recognize that the proper employment of scientific and technological discoveries and advances in nuclear and related fields and direct and collateral application and adaptation of processes and techniques developed in connection therewith, properly correlated with the other resources of the region, can assist substantially in the industrial progress of the west and the further development of the economy of the region. They also recognize that optimum benefit from nuclear and related scientific or technological resources, facilities and skills requires systematic encouragement, guidance, assistance, and promotion from the party states on a co-operative basis. It is the policy of the party states to undertake such co-operation on a continuing basis. It is the purpose of this compact to provide the instruments and framework for such a co-operative effort in nuclear and related fields, to enhance the economy of the west and contribute to the individual and community well-being of the region's people.

### ARTICLE II.

### The Board

(a) There is hereby created an agency of the party states to be known as the "western interstate nuclear board," hereinafter called the board. The board shall be composed of one (1) member from each party state designated or appointed in accordance with the law of the state which he represents and serving and subject to removal in accordance with such law. Any member of the board may provide for the discharge of his duties and the performance of his functions thereon, either for the duration of his membership or for any lesser period of time, by a deputy or assistant, if the laws of his state make specific provisions therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

# EXISTING LAW ON TORT ACTIONS AGAINST STATE

## TORT ACTIONS AGAINST STATE



**83-701. Jurisdiction of district courts.** The district courts of the state of Montana shall have exclusive jurisdiction on any claim against the state of Montana for injury to person or property, accruing on or after July 2, 1973, on account of damage to or loss of property, or on account of personal injuries or death caused by the negligence or wrongful act or omission of any employee of the state of Montana, while acting within the scope of his office or employment, under circumstances where the state of Montana, if a private person, would be liable to the claimant for such damage, loss, injury or death, in accordance with the law of the state of Montana.

History: En. Sec. 1, Ch. 254, L. 1959; amd. Sec. 1, Ch. 93, L. 1973.

### Amendments

The 1973 amendment deleted "to hear, determine, and render judgment to the extent of the insurance coverage carried by the state of Montana" after "exclusive jurisdiction"; substituted "for injury to person or property, accruing on or after July 2, 1973" for "for money only, accruing on or after the passage and approval of this act"; and deleted two sentences reading: "The state of Montana shall be liable in respect of such claims to the said claimant in the same manner and to the same extent as a private individual under like circumstances, except the state of Montana shall not be liable for interest prior to judgment, nor for punitive damages. Costs shall be allowed in all courts to the successful complainant, to the same extent if the state of Montana were a private litigant, except that such costs shall not include attorneys' fees."

### Purpose of Act

The purpose of the legislature in enacting this chapter was to establish the doctrine of sovereign immunity and to provide certain waivers of that immunity. Kish v. Montana State Prison, — M —, 505 P 2d 891.

### Sovereign Immunity

State prison which participated in forest fire-fighting effort by leading a bulldozer, a guard and two prisoners to operate the bulldozer, all of whom were under the direction of the United States Forest Service during the fighting of the fire, was immune under doctrine of sovereign

immunity from suit for injuries to person who, several days after fire had been extinguished, was injured when wind caused an uprooted tree which had been left leaning against another tree to fall on him; since prison was attempting to protect its own land adjacent to the fire area, it was engaged in a governmental rather than a proprietary function. Kish v. Montana State Prison, — M —, 505 P 2d 891.

DECISIONS UNDER FORMER LAW

Sovereign Immunity

Limitations of the doctrine of sovereign immunity (40-4401 et seq., 75-5939 et seq., and 83-701 et seq.) are binding upon the supreme court so that state is not liable in excess of collectible insurance. Kaldahl v. State Highway Commission, 158 M 219, 490 P 2d 220.

State highway commission and state of Montana are immune from suit for plaintiffs' injuries and property damage to their automobile despite allegations that the highway department had not kept the highway in proper and reasonable repair, or erected appropriate warning signs where there was a dangerous and unsafe section containing "chuck" holes, one of which caused plaintiffs' automobile to jolt out of control, overturn, and injure plaintiffs. Kaldahl v. State Highway Commission, 158 M 219, 490 P 2d 220.

83-702. Practice and procedure. In actions under the provisions of this act, the forms of process, writs, pleadings and motions, and the practice and procedure shall be the same as if the state of Montana were a private person, and the same provisions for counterclaim and setoff, and for interest upon judgment shall be the same as if the state of Montana were a private person.

History: En. Sec. 2, Ch. 254, L. 1959.

83-703. Right of appeal—bond not to be required of state. The right of appeal from final judgment in the district court shall be governed by the same rules of practice and procedure that exist for private persons, except the state of Montana shall at no time be required to post a bond either on appeal or at any other time during the said litigation.

History: En. Sec. 3, Ch. 254, L. 1959.

83-704. Attorney general—service of process upon—power to arbitrate, compromise and settle. The attorney general of the state of Montana is hereby designated as the person upon whom all process shall be served, and he shall have full charge of such litigation on behalf of the state of Montana, and by and with the consent of the board of examiners of the state of Montana, he is authorized to arbitrate, compromise or settle any claim cognizable under this act, after the institution of any suit thereon, and further, with the approval of the court in which said suit is pending.

History: En. Sec. 4, Ch. 254, L. 1959.

83-705. Judgment as obligation of state. A final judgment shall be the obligation of the state of Montana, and shall be paid in the same manner as other claims against the state.

History: En. Sec. 5, Ch. 254, L. 1959.

83-706. Repealed.

Repeal

Section 83-706 (Sec. 6, Ch. 254, L. 1959), creating state immunity from liability in excess of insurance coverage, was repealed by Sec. 3, Ch. 93, Laws 1973.

83-706.1. Governmental immunity abolished. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to claims for relief and causes of action arising after July 1, 1973. The state, through the department of administration, has the right to provide for self insurance for claims for injury to a person or property. The state, counties, cities, towns, and all other local governmental entities have the right also, but not the duty, to purchase insurance to protect against claims for injury to a person or property.

History: En. 83-706.1 by Sec. 2, Ch. 93, L. 1973.

Title of Act

An act to implement article II, section 18, concerning sovereign immunity by providing availability of insurance coverage for governmental entities; amending section 87-701 [83-701], R. C. M. 1947; repealing section 83-706, R. C. M. 1947; and providing for an effective date.

Repealing Clause

Section 3 of Ch. 93, Laws 1973 read "Section 83-706, R. C. M. 1947, is repealed."

Effective Date

Section 4 of Ch. 93, Laws 1973 read "Section 1 and Section 3 of this act are effective on July 1, 1973, Section 2 is effective on passage."

83-707. Act not to affect causes of action arising under Workmen's Compensation Act. Nothing herein contained shall be construed to affect any cause of action arising under the Workmen's Compensation Act.

History: En. Sec. 7, Ch. 254, L. 1959.

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO SPECIFICALLY PROVIDE THE STATE, COUNTIES, TOWNS, AND ALL OTHER LOCAL GOVERNMENT ENTITIES AND THE OFFICERS, AGENTS, AND EMPLOYEES OF THOSE ENTITIES IMMUNITY FROM SUIT FOR INJURY TO A PERSON OR PROPERTY IN CERTAIN CASES IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE II, SECTION 18 OF THE CONSTITUTION OF THE STATE OF MONTANA; AMENDING SECTION 82-4310, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 82-4310, R.C.M. 1947, is amended to read as follows:

"82-4310. Governmental entities liable for torts <u>except as specifically provided by the legislature</u>. Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function <u>except as specifically provided by the legislature under Article II, section 18 of the Constitution of the State of Montana</u>."

Section 2. Immunity from suit for legislative acts and omissions. (1) As used in this section:

(a) the term "governmental entity" includes the state, counties, municipalities, and school districts;

(b) the term "legislative body" includes the legislature vested with legislative power by Article V of The Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards.

(2) A governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.

(3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.

(4) The immunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.

Section 3. Immunity from suit for judicial acts and omissions. (1) The state and other governmental units are immune from suit for acts or omissions of the judiciary.

(2) A member, officer, or agent of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court.

(3) The judiciary includes those courts established in



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accordance with Article VII of The Constitution of the State of Montana.

Section 4. Immunity from suit for certain gubernatorial actions. The state and the governor are immune from suit for damages arising from the lawful discharge of an official duty associated with vetoing or approving bills or in calling sessions of the legislature.

Section 5. Immunity from suit for certain actions by local elected executives. A local governmental entity and the elected executive officer thereof are immune from suit for damages arising from the lawful discharge of an official duty associated with vetoing or approving ordinances or other legislative acts or in calling sessions of the legislative body.

Section 6. State or other governmental entity immune from exemplary and punitive damages. The state and other governmental entities are immune from exemplary and punitive damages.

Section 7. Actions under invalid law or rule -- same as if valid -- when. (1) If an officer, agent, or employee of the state or of a county, municipality, taxing district, or other political subdivision of the state acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the





constitution of the United States, neither he nor any other officer or employee of the governmental entity he represents, nor the governmental entity he represents, is civilly liable in any action in which he, such other officer, or such governmental entity would not have been liable had the law been valid.

(2) If an officer, agent, or employee of the state, or of a county, municipality, taxing district, or other political subdivision of the state acts in good faith, without malice or corruption, and under the authority of a duly promulgated rule or ordinance and that rule or ordinance is subsequently declared invalid, neither he nor any other officer, agent, or employee of the governmental unit he represents, nor the governmental entity he represents, is civilly liable in any action in which no liability would attach had the rule or ordinance been valid.

Section 8. Limitation on governmental liability for damages in tort -- petition for relief in excess of limits. (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for:

(a) noneconomic damages; or

(b) economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each

occurrence.

(2) The legislature or the governing body of a county, municipality, taxing district, or other political subdivision of the state may authorize payments for economic damages in excess of the sum authorized in subsection (1)(b) of this section upon petition of plaintiff following a final judgment.

(3) As used in this section:

(a) "economic damages" means tangible pecuniary losses;

(b) "noneconomic damages" means those damages not included in economic, punitive, or exemplary damages including, without limitation, damages for pain and suffering, loss of consortium, mental distress, and loss of reputation.

Section 9. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

-End-

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE ESTABLISHMENT OF SELF-INSURANCE PROGRAMS FOR STATE AND LOCAL GOVERNMENTAL ENTITIES WITH CERTAIN GUIDELINES; TO CLARIFY THE MEANS BY WHICH CLAIMS AGAINST GOVERNMENTAL ENTITIES MAY BE SETTLED; TO CLARIFY THE MEANS BY WHICH JUDGMENTS AGAINST GOVERNMENTAL ENTITIES MAY BE SATISFIED; AMENDING SECTIONS 82-4303, 82-4305, 82-4306, 82-4309, 82-4311, 82-4312, 82-4318, AND 82-4319, R.C.M. 1947; AND REPEALING SECTIONS 82-4313 THROUGH 82-4317, 82-4326, 83-701 THROUGH 83-706, 83-706.1, AND 83-707, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 82-4303, R.C.M. 1947, is amended to read as follows:

"82-4303. Comprehensive insurance plan for state -- risks insured -- deductible insurance. (1) The department of administration ~~shall--be~~ is responsible for the acquisition and administration of all the insurance purchased for protection of the state, as defined ~~herein~~ in this chapter.

(2) The department of administration shall, after consultation with the departments, agencies, commissions, and other instrumentalities of the state, provide comprehensive insurance plan for the state providing insurance coverage to the state in amounts determined and set by the department of administration and ~~shall have the authority to~~ may purchase, renew, cancel, and modify all policies according to the comprehensive insurance plan. The plan may include property, casualty, liability, crime, and fidelity, and any such other policies of insurance as the department of administration may from time to time deem reasonable and prudent.

(3) The department of administration may in its discretion elect to utilize a deductible insurance plan, either wholly or in part. ~~Such a plan shall never have a deductible amount in excess of twenty-five thousand dollars ($25,000) per occurrence, and shall contain provisions allowing for an aggregate deductible amount not to exceed two hundred fifty thousand dollars ($250,000) annually under each type of insurance as enumerated in the preceding paragraph.~~"

Section 2. Section 82-4305, R.C.M. 1947, is amended to read as follows:

"82-4305. Apportionment of costs -- creation of deductible reserve ~~if deductible plan elected~~. (1) The department of administration shall apportion the costs of all insurance purchased under this ~~act~~ chapter to the individual state participants, and the costs shall be paid

to the department subject to appropriations by the legislature.

(2) The department of administration, if it elects to utilize a deductible insurance plan, is authorized to charge the individual state participants an amount equal to the cost of a full-coverage insurance plan, until such time as a deductible reserve is established. ~~in the amount of two hundred fifty thousand dollars ($250,000), the amount of the total aggregate amount deductibles is created.~~ In each subsequent year, the department ~~shall be authorized to~~ may charge a sufficient amount over the actual cost of the deductible insurance to replenish such deductible reserves.

(3) The department of administration may accumulate a self-insurance reserve fund sufficient to provide self-insurance for all liability coverages that, in its discretion, the department considers should be self-insured. Payments into the self-insurance reserve fund must be made from a legislative appropriation for that purpose. Proceeds of the fund may be used only to pay claims under this chapter and for actual and necessary expenses required for the efficient administration of the fund.

(4) Money in reserve funds established under this section not needed to meet expected expenditures shall be invested and all proceeds of the investment credited to the fund."





Section 3. Section 82-4306, R.C.M. 1947, is amended to read as follows:

"82-4306. Political subdivisions. (1) All political subdivisions of the state ~~shall have the authority to~~ may procure insurance ~~under this act~~ separately or jointly with other subdivisions and may elect to use a deductible or self-insurance plan, wholly or in part.

(2) A political subdivision that elects to establish a deductible plan may establish a deductible reserve.

(3) A political subdivision that elects to establish a self-insurance plan may accumulate a self-insurance reserve fund sufficient to provide self-insurance for all liability coverages that, in its discretion, the political subdivision considers should be self-insured. Payments into the reserve fund must be made from local legislative appropriations for that purpose. Proceeds of the fund may be used only to pay claims under this chapter and for actual and necessary expenses required for the efficient administration of the fund.

(4) Money in reserve funds established under this section not needed to meet expected expenditures shall be invested and all proceeds of the investment credited to the fund."

Section 4. Section 82-4309, R.C.M. 1947, is amended to read as follows:

"82-4309. Political subdivision tax levy to pay premiums. Notwithstanding any provisions of law to the contrary, all political subdivisions ~~shall have authority to~~ may levy an annual property tax in the amount necessary to pay fund the premium for insurance, deductible reserve fund, and self-insurance reserve fund as herein authorized, even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded thereby, provided that the revenues derived therefrom may not be used for any other purpose."

Section 5. Section 82-4311, R.C.M. 1947, is amended to read as follows:

"82-4311. Filing of claims against state -- time of filing. All claims against the state arising under the provisions of this act shall be presented to and filed with the ~~secretary of state within one hundred twenty (120) days from the date of the occurrence from which the claim arose or when the injury should reasonably have been discovered, whichever is later. A fee of ten dollars ($10) shall be paid to the secretary of state at the time the claim is presented for filing~~ department of administration."

Section 6. Section 82-4312, R.C.M. 1947, is amended to read as follows:

"82-4312. Filing of claims against political subdivisions -- time for filing. All claims against a





political subdivision arising under the provisions of this act shall be presented to and filed with the clerk or secretary of the political subdivision ~~within one hundred twenty (120) days from the date of the occurrence from which the claim arose or when the injury should reasonably have been discovered, whichever is later.~~"

Section 7. There is a new R.C.M. section that reads as follows:

Limitation of actions. A claim against the state or a political subdivision is subject to the limitation of actions provided by law.

Section 8. Section 82-4318, R.C.M. 1947, is amended to read as follows:

"82-4318. Compromise or settlement of claim against political subdivision. The governing body of each political subdivision, after conferring with its legal officer or counsel, may compromise and settle any claim allowed by this act, subject to the terms of the insurance, if any. A settlement involving a self-insurance reserve fund or deductible reserve fund must be approved by the district court where the claim is filed."

Section 9. Section 82-4319, R.C.M. 1947, is amended to read as follows:

"82-4319. Compromise or settlement of claim against state. The department of administration may compromise and

settle any claim allowed by this act, subject to the terms of insurance, if any. A settlement involving the self-insurance reserve fund or deductible reserve fund must be approved by the district court of Lewis and Clark County."

Section 10. There is a new R.C.M. section that reads as follows:

Judgments against governmental entities except state -- now satisfied. (1) A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:

(a) insurance;

(b) the general fund or any other funds legally available to the governing body;

(c) a property tax, otherwise properly authorized by law, collected by a special levy authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may nto exceed 10 mills;

(d) proceeds from the sale of bonds issued by a county, city, or school district for the purpose of derivin revenue for the payment of the judgment liability. Th governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any





such bonds or judgments may not exceed, in the aggregate, 10 mills annually.

(2) No penalty or interest may be assessed against any governmental entity as a result of a delayed payment of a judgment liability.

Section 11. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 12. Repealer. Sections 82-4313 through 82-4317, 82-4326, 83-701 through 83-706, 83-706.1, and 83-707, R.C.M. 1947, are repealed.

-End-

APPENOIX E

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR APPROVAL OF ATTORNEY FEES IN CONNECTION WITH CLAIMS AGAINST GOVERNMENTAL ENTITIES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Review of attorney fees for claims against state. If an award or settlement in excess of $50,000 is granted in any claim against the state or a county, municipality, taxing district, or other political subdivision of the state, the fee of plaintiff's attorney is subject to approval by the court. The court may approve a reasonable fee with due regard to the time spent by the attorney, the complexity of the case, and the skill demonstrated by the attorney in the case.

-End-

APPENDIX F

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT REMOVING AND CLARIFYING STATUTORY REFERENCES TO SOVEREIGN OR GOVERNMENTAL IMMUNITY TO COORDINATE THOSE REFERENCES WITH ARTICLE II, SECTION 18, OF THE CONSTITUTION OF THE STATE OF MONTANA OR PROVISIONS OF TITLE 82, CHAPTER 43, R.C.M. 1947, AS AMENDED; AMENDING SECTIONS 1-502, 16-1802, 17-205, 32-4722, 40-4401, 40-4402, 75-8310, AND 93-2815, R.C.M 1947; AND REPEALING SECTIONS 11-1305, 11-1306, 16-2731, 16-2732, 16-2733, 31-172, 69-6405, 75-5940, AND 76-243, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 1-502, R.C.M. 1947, is amended to read as follows:

"1-502. Aeronautics functions governmental -- no liability for torts. ~~(1)~~ The acquisition of lands for establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities whether by the state separately or jointly with a municipality; the assistance of this state in that acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation; and the exercise of any other powers granted to the department are public and governmental functions, exercised for a public purpose, and matters of public necessity, and such lands and other property and privileges acquired and used by the state in the manner and for the purposes enumerated in this title are acquired and used for public and governmental purposes and as a matter of public necessity.

~~(2)--No--suit--in--tort--may--be--brought-or-maintained against-the-state-or-any-municipality-of-the-state,-or-their officers,-agents,-servants,-or-employees,-on-account--of--an act---done---in--or--about--the--construction,--maintenance, enlargement,-operation,-superintendence,-or-management-of-an airport-or-other-air-navigation-facility.~~"

Section 2. Section 16-1802, R.C.M. 1947, is amended to read as follows:

"16-1802. Claims to be itemized -- time for presenting. No account must be allowed by the board unless the same is made out in separate items, the nature of each item stated; if it is for official services for which no specified fees are fixed by law, the time actually and necessarily devoted to such service must be stated. Claims against the county shall contain the following statement: "I certify that this claim is correct and just in all respects,

and that payment or credit has not been received." Claims need not be verified by affidavit. Every claim against the county, except claims arising from injury to a person or property, which are limited under provisions of Title 82, chapter 43, as amended, must be presented within a year after the last item accrued."

Section 3. Section 17-205, R.C.M. 1947, is amended to read as follows:

"17-205. In actions other than contract. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. This section does not apply in actions for recovery of damages arising from injury to a person or property brought against a governmental entity under Title 82, chapter 43, as amended."

Section 4. Section 32-4722, R.C.M. 1947, is amended to read as follows:

"32-4722. Advertising deemed unlawful -- notice to remove -- hearing -- appeal to district court. (1) The following outdoor advertising is unlawful:

(a) ~~When~~ when erected after June 24, 1971, contrary to this act, or erected after the effective date of this act beyond ~~six--hundred-sixty-(660)~~ feet of the nearest edge of the right-of-way of an interstate or primary highway outside of an urban area with the purpose of its message being read





from such ~~main-traveled~~ main-traveled way and visible from such ~~main-traveled~~ main-traveled way, unless such outdoor advertising meets the criteria of subsections (i), (ii), or (iii) of subsection (a) of ~~section~~ 32-4717; or

(b) ~~When~~ when a permit is not obtained as prescribed in this act; or

(c) ~~When~~ when a permittee fails to comply with a notice of violation as provided in ~~section~~ 32-4721.

(2) The department shall give notice in writing, either by certified mail or by personal service, to the owner or occupant of the land on which advertising believed to be unlawful is located and to the owner of the outdoor advertising structure, if the latter is known, or if unknown, by posting notice, in a conspicuous place on the structure, of its intention to remove the unlawful advertising. Within ~~forty-five-(45)~~ days after the notice, the owner of the land or of the structure may make a written request for a hearing before the commission to show cause why the structure should not be removed.

(3) If a hearing before the commission is not requested, or if there is no appeal taken from the commission's decision at the hearing, or if the commission's decision is affirmed on appeal, the department shall immediately remove, or cause to be removed, the unlawful outdoor advertising. The owner of the structure and the

owner or occupant of the land are jointly and severally liable for the costs of the removal. The department may enter upon lands bearing outdoor advertising and make examination of such advertising. The department may, upon final determination by the commission that an item of outdoor advertising is unlawful, enter upon lands bearing such advertising and remove the unlawful advertising. ~~The department incurs no liability for the entry or entries except for injuries resulting from negligence, wantonness or malice.~~"

Section 5. Section 40-4401, R.C.M. 1947, is amended to read as follows:

"40-4401. Waiver of defense of ~~sovereign~~ immunity required. All contracts or policies of casualty insurance covering state-owned properties or state risks must contain ~~therein as a part thereof~~ an agreement on the part of the insurer waiving all right to raise the defense of ~~sovereign~~ immunity from suit. No money ~~shall~~ may be paid out of the state treasury to any person, firm, or corporation, as a consideration or premium on any such policy or contract of casualty insurance unless the policy or contract contains such an agreement."

Section 6. Section 40-4402, R.C.M. 1947, is amended to read as follows:

"40-4402. ~~Sovereign immunity~~ Immunity defense





prohibited when liability insured -- reduction of award to policy limits. Whenever an insurer accepts any premium, money, or other consideration from a political subdivision of the state, municipality, or any public body, corporation, commission, board, agency, organization, or other public entity for casualty or liability insurance, neither such insured nor insurer ~~shall~~ may raise the defense of ~~sovereign or governmental~~ immunity from suit in any damage action brought against such insured or insurer, and any agreement in the insurance contract permitting the defense of ~~sovereign or governmental~~ immunity is ~~hereby declared~~ void. No attempt ~~shall~~ may be made in the trial of an action brought against such political subdivision of the state, municipality, or any public body, corporation, commission, board, agency, organization, or other public entity, to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of plaintiff. If the court ~~shall determine~~ determines that the defendant could have successfully raised the defense of ~~sovereign or governmental~~ immunity, and if the verdict exceeds the limits of the applicable insurance, the court shall reduce the amount of such judgment or award to a sum equal to the applicable limit stated in the policy."

Section 7. Section 75-8310, R.C.M. 1947, is amended to read as follows:

"75-8310. School safety patrols. (1) The trustees of any district or the administration of any private school ~~shall have the authority to~~ may organize and supervise school safety patrols for a school under their authority. The purpose of school safety patrols ~~shall be~~ is to influence and encourage other pupils of the school to refrain from crossing public highways at points other than regular crossings and to direct pupils as to when and where to cross highways.

(2) The school safety patrol shall be formed from the children of the school who are ~~nine (9)~~ years of age or more or, if there are none, who are of the highest grade of such school. Before any child may serve on the school safety patrol, the parent or guardian of such child shall give written consent for his child to serve on the school safety patrol.

(3) No liability ~~shall attach either~~ attaches to ~~the school, educational institution, governing board, directing authority,~~ a member of the school safety patrol or parent or guardian, ~~or any individual director, member of the trustees, district superintendent, principal, teacher, or other school authority~~ by virtue of the organization, maintenance, or operation of such school safety patrol because of ~~injuries~~ injury sustained by any pupil, whether a member of the patrol or otherwise by reason of the operation





and maintenance thereof unless that injury results from gross negligence or purposeful conduct of such person.

(4) Identification and operation of school safety patrols shall be uniform throughout the state and the method of identification and signals to be used shall be as prescribed by the superintendent of public instruction in cooperation with the Montana highway patrol.

(5) Any municipality, city, or town of this state may provide for the training of members of the school safety patrol at any authorized school patrol camp located in this state and may pay the expense necessarily incurred in providing such training, out of any funds available for such purpose."

Section 8. Section 93-2815, R.C.M. 1947, is amended to read as follows:

"93-2815. Joinder of state as defendant in certain actions. In any action or proceeding brought in any district court of the state of Montana affecting the title to real or personal property in which the state of Montana has, or claims to have, an interest or claim, the state of Montana may be made a party defendant to such actions or proceedings, and its rights or interests adjudicated; ~~provided, however, that in no event shall any money judgment be rendered against the state of Montana in any action or proceeding brought under the provisions of this act.~~"

Section 9. Repealer. Sections 11-1305, 11-1306, 16-2731, 16-2732, 16-2733, 31-172, 46-243, 69-6405, and 75-5940, R.C.M.1947, are repealed.

-End-

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO CONTINUE CERTAIN IMMUNITIES FROM SUIT ESTABLISHED BY CERTAIN STATUTES BY REENACTING THESE STATUTES UNDER PROVISIONS OF ARTICLE II, SECTION 18, OF THE CONSTITUTION OF THE STATE OF MONTANA; AMENDING, CLARIFYING, AND REENACTING SECTIONS 28-603, 77-2308, 89-115, AND 89-3514, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 28-603, R.C.M. 1947, is amended to read as follows:

"28-603. Powers of board. (1) Boards of county commissioners may in their discretion establish fire seasons annually during which no person ~~shall~~ may ignite or set any forest fire, ~~or slash-burning~~ slash-burning fire, ~~or land clearing~~ land-clearing fire, ~~or debris burning~~ debris-burning fire, or ~~any~~ open fire, within any forest, range, or crop lands, subject to the pruvisions of this act, without having obtained an official written permit to ignite or set such fire from a county rural fire chief or from a district rural fire chief authorized by the board to issue such permits for such lands~~;~~.

(2) Any person who ~~shall ignite~~ ignites or ~~set~~ sets any forest fire, ~~or slash burning~~ slash-burning fire, or ~~land clearing~~ land-clearing fire, ~~or debris burning~~ debris-burning fire, or ~~any~~ open fire, within any forest, range, or crop land subject to the provisions of this act without first having obtained a written permit to ignite or set such fire ~~shall be~~ is guilty of a misdemeanor~~;~~.

(3) To augment rural crews in case of serious emergency, the boards may provide for the organization and training of voluntary urban fire crews to be used in rural areas~~;~~.

(4) Any county rural fire chief ~~and/or~~ district rural fire chief or his deputy may enter private property ~~either with or without~~ or direct the entry of fire control crews for the purpose of suppressing fires~~;~~, ~~and are exempt from any damage resulting from such activity;~~ A chief or deputy and the county or rural district are immune from suit for injury to persons or property resulting from actions taken to suppress fires under this subsection.

(5) The board is authorized to appropriate from the general fund of the county not to exceed ~~fifteen thousand dollars ($15,000)~~ per year for the purchase, care, and maintenance of ~~fire fighting~~ firefighting equipment, or for the payment of wages to skilled operators of heavy mechanized equipment in the suppression of fires when ~~deemed~~ considered necessary; or if the general fund is budgeted to

the full limit, the board may at any time fixed by law for levy and assessment of taxes levy a tax at such rate as in their judgment will be necessary to raise such needed sum not to exceed ~~fifteen thousand dollars ($15,000)~~."

Section 2. Section 77-2308, R.C.M. 1947, is amended to read as follows:

"77-2308. Immunity from liability. (1) Neither the state nor any political subdivision of the state, nor the agents or representatives of the state or any political subdivision thereof, ~~shall be~~ are liable for personal injury or property damage sustained by any person appointed or acting as a volunteer civilian defense worker, or member of any agency engaged in civilian defense activity during a disaster or catastrophe. This section does not affect the right of any person to receive benefits or compensation to which he might otherwise be entitled under the ~~workmen's~~ workers' compensation law or any pension law or any act of ~~Congress~~ congress.

(2) Neither the state nor any political subdivision of the state, nor, except in cases of willful misconduct, gross negligence, or bad faith, the employees, agents, or representatives of the state or any political subdivision thereof, nor any volunteer or auxiliary civilian defense worker or member of any agency engaged in civilian defense activity during a disaster or catastrophe, nor the owners of





facilities used for civil defense shelters, pursuant to a fallout shelter license or privilege agreement and while complying with or reasonably attempting to comply with this chapter, or any order, or rule, ~~or regulation~~ promulgated under the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivisions of the state, ~~shall be~~ are liable for the death of or injury to persons, or for damage to property, as a result of any such activity."

Section 3. Section 89-115, R.C.M. 1947, is amended to read as follows:

"89-115. Water funds -- rates -- sale of water -- appeals to board -- lease and sale of water rights and property. (1) Subject to this act and ~~section~~ 89-103.2, the department may fix and establish the prices, rates, and charges at which the resources and facilities made available under this act may be sold and disposed of, and enter into contracts and agreements, and do those things which in its judgment are necessary, convenient, or expedient for the accomplishment of the purposes and objects of this act, under such general regulations, and upon such terms, limitations, and conditions as it prescribes. ~~the~~ The department shall enter into the contracts and fix and establish the prices, rates, and charges so as to provide at

all times funds which will be sufficient to pay all costs of operation and maintenance of the works authorized by this act, together with necessary repairs thereto, and which will provide at all times sufficient funds to meet and pay the principal and interest of all bonds or loans as they severally become due and payable~~.~~ ~~This~~ This act does not authorize any change, alteration, or revision of those rates, prices, or charges as established by any contract entered into under this act except as provided by the contract.

(2) An incorporated water users' association that is sustaining and responsible for the operations of a works is solely liable for any court action which may be brought against it ~~or the state of Montana~~ for any injury or damages occurring on the works caused by a failure to maintain safe working and operating conditions. The state of Montana is not liable for injury to a person or property that occurs on a works as a result of a failure by a water users' association to maintain the works in a safe working and operating condition.

(3) A contract made by the department for the sale of water, use of water, water storage, or other service, or for the sale of any property or facilities, shall provide that in the event of a failure or default in the payment of moneys specified in the contract to be paid to the





department, the department may, upon notice as is prescribed in the contract, terminate the contract and all obligations thereunder. The act of the department in ceasing on default to furnish or deliver water, use of water, water storage, or other service under the contract does not deprive the department of, or limit any remedy provided by the contract or by law for the recovery of moneys due or which may become due under the contract.

(4) (a) A person aggrieved by a decision of the department to terminate any contract under subsection (3) may appeal to the board and be heard thereon by filing written notice of the appeal with the department within ~~ten~~ (10) days after receiving notice of termination of the contract from the department. The termination of the contract ~~shall be~~ is stayed if an appeal is taken.

(b) If a dispute arises between the department and another party regarding amounts owing or the terms and conditions under a water marketing or water purchase contract, or under a contract for the construction or repair of works, that party may appeal to the board for a hearing thereon and a resolution of the dispute by filing written notice of the appeal with the department within ~~thirty~~ (30) days after the final decision of the department regarding the dispute.

(5) Subject to the approval of the board under ~~section~~

89-103.2, the department may sell, transfer to water user associations, abandon, or otherwise dispose of any ~~rights-of-way~~ rights-of-way, easements, or property when it determines that they are no longer needed for the purposes of this act, or lease or rent the same or otherwise take and receive the income or profit and revenue therefrom. A determination shall be made by the department as to the market value of ~~rights-of-way~~ rights-of-way, easements, or property to be sold, transferred, abandoned, or otherwise disposed of. All income or profit and revenue of the works and all moneys received from the sale or disposal of water, use of water, water storage, or other service, and from the operation, lease, sale, or other disposition of the works, property, and facilities acquired under this act, shall be deposited to the state general fund."

Section 4. Section 89-3514, R.C.M. 1947, is amended to read as follows:

"89-3514. Permit construed as added requirement -- exception -- immunity. (1) The granting of a permit under this act does not affect any other type of approval required by any other statute or ordinance of the state, of any political subdivision, or of the United States, but is an added requirement; however, if a political subdivision enacts, in harmony with the purposes of this act, permit issuance ordinances, regulations, or resolutions and





land-use ordinances, regulations, or resolutions which meet or exceed the minimum standards of the board, and if the administrative and enforcement procedures established for those ordinances, regulations, or resolutions are found acceptable by the board, no permit from the department is required; however, if the board determines that there is a failure by a political subdivision to comply with the intent, purposes, and provisions of this act and the minimum standards adopted thereunder, the powers of the political subdivision may be suspended after hearing, and the minimum standards adopted by the board shall be enforced by the department until such time as the board determines that the political subdivision will comply. The grant or denial of a permit does not have an effect on a remedy of a person at law or in equity; however, where it is shown that there is a wrongful failure to comply with this act, there is a rebuttable presumption that the obstruction was the proximate cause of the flooding of the land of a person bringing suit.

(2) An action for damages sustained because of injury caused by an obstruction for which a permit has been granted under this act may not be brought against the state, the board, a member of the board, or the department. This act does not interfere with the right of the United States to regulate interstate commerce or the navigable waters of the

United States."

-End-